

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





~~75-7038~~ ~~75-7055~~  
~~75-7038~~ 75-7057

75-7079  
75-7082

United States Court of Appeals  
For the Second Circuit

HOWARD BERSCH,

*Plaintiff-Appellee,*

*against*

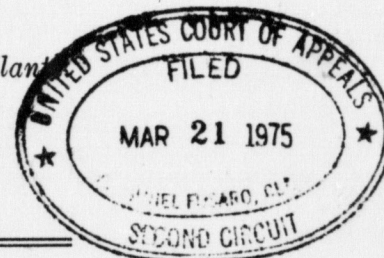
DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE  
ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS MA-  
HON & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH,  
BARNEY & CO. INCORPORATED, J. H. CRANG AND CO., INVESTORS  
OVERSEAS BANK LIMITED,

*Defendants,*

ARTHUR ANDERSEN & Co., I.O.S., LTD.,  
and BERNARD CORNFELD,

*Defendants-Appellants*

Appeal from the United States District Court  
for the Southern District of New York



APPELLANTS' APPENDIX

VOLUME I OF THREE VOLUMES

(Pages 1A to 190A)

BREED, ARLOTT & MORGAN

One Chase Manhattan Plaza  
New York, New York 10005

WILSON & McILVAINE

135 South LaSalle Street  
Chicago, Illinois 60603

*Attorneys for Defendant-Appellant  
Arthur Andersen & Co.*

WACHTELL, LIPTON, ROSEN & KATZ

299 Park Avenue  
New York, New York 10017

*Attorneys for Defendant-Appellant  
I.O.S., Ltd.*

GOLD, FARRELL & MARKS

595 Madison Avenue  
New York, New York 10022

*Attorneys for Defendant-Appellant  
Bernard Cornfeld*

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### Relevant Docket Entries

71 Civ 5373

**BDATE**

**PROCEEDINGS**

- 12- 9-71 Filed Complaint. Issued Summons.
- 1-17-72 Filed Answer of Deft. Drexel Firestone, Inc.
- 1-17-72 Filed Interrogs to Pltff. by Deft. Drexel Firestone, Inc.
- 1-18-72 Filed Answer of Arthur Andersen & Co. to complaint.
- 1-19-72 Filed Answer of deft. Smith, Barney & Co. Inc. to complaint.
- 2- 8-72 Filed Answer of Guinness Mahon & Co. Ltd. to complaint.
- 2- 8-72 Filed Answer of Hill Samuel & Co. Ltd. to complaint.
- 2- 9-72 Filed Answer of deft. Pierson, Heldring & Pierson to complaint.
- 2-23-72 Filed Answer of deft. Banque Rothschild to complaint.
- 2-29-72 Filed Answer of J. H. Crang & Co. Ltd. to complaint.
- 4- 4-72 Filed answer to interrogatories.
- 4-14-72 Filed Notice of Motion re: Class Action. (by pltf.) Ret. 5/16/72.
- 5- 1-72 Filed Affidavit in opposition to motion for class action treatment. (by defts. Drexel Firestone, Hill Samuel & Co., Guinness Mahon & Co. Ltd. and Pierson, Heldring & Pierson).
- 5- 2-72 Filed Affidavit in opposition.
- 5- 2-72 Filed Memorandum of Deft. Arthur Andersen & Co. in opposition to pltf's. motion for an order determining class action.
- 5- 4-72 Filed Affidavit in opposition to pltf's. motion to establish this action as a class action.
- 5-15-72 Filed Reply Affidavit of Sidney B. Silverman in support of pltf's. class action motion.



DATE	PROCEEDINGS
5-15-72	Filed Affidavit in opposition to class action motion.
6-28-72	Filed Affidavit in opposition to class action motion (of Kenneth L. Beaugrand) (filed in Court 5/18/72).
6-28-72	Filed Memorandum Opinion #38611. Frankel, J. Motion to proceed as a class action is granted, etc. It is so ordered. (mailed notice).
11- 8-72	Filed affdvt of Charles Jolibois to furnish the Court my opinion regarding the effect which the french courts would give to a judgment on the merits against the plttf class & in favor of the defts in this action.
12-27-72	Filed Order on consent (for further details see order in file room 507) So Ordered 12-27-72. Ryan, J.
4- 2-73	Filed Order that all discovery be completed by plttf. by 9/1/73, etc. Ryan J. (M/N)
10-31-73	Filed IOB Notice of Motion. Re: Conditional Class Action determination. 12/20/73.
10-31-73	Filed Deft. Arthur Andersen & Co. Notice of Motion. Re: Conditional Class Action Determination. ret. 12/70/73.
11- 1-73	Filed Deft. Banque Rothschild & Smith Barney & Co., Inc. Notice of Motion. Re: Dismissing Complaint. ret. 12/20/73.
11- 1-73	Filed Deft. J. H. Crang Notice of Motion. Re: Dismiss Complaint. ret. 11/12/73.
11- 1-73	Filed Defts. Drexel Firestone Inc., et al. Notice of Motion. Re: Class Action ret. 12/20/73.
11-14-73	Filed Affidavit of Peter Grandin Gallichan in support of the motion of Hill Samuel to dismiss the complaint.
11-14-73	Filed Affidavit by Peter Grandin Gallichan (sic [Hugh M. Sassoon]) in support of the motion of Guinness Mahon to dismiss the complaint.
11-27-73	Filed Deposition of Frederick M. Werblow on 6/20/73. (mailed notice)
11-28-73	Filed Deposition of Grayson Murphy on 5/2/73.

## DATE

## PROCEEDINGS

- 1-10-74 Filed transcript of record of proceedings, dated Dec 5 1973.
- 2-21-74 Filed deft. Cornfeld's affdvt. and notice of motion (and exhibits) to dismiss complaint for lack of jurisdiction over deft. Cornfeld; (2) for an order amending the conditional class action determination of Judge Frankel of June 28-72—date to be fixed by Court some time in April.
- 4-18-74 Filed affdvt. and deft. I.O.S. Ltd.'s motion to dismiss complaint under Rule 12(b)(5)—(ret. date to be fixed by court)
- 11-27-74 Filed Opinion #41494 \* \* \* The motions of all defendants to dismiss for lack of subject matter jurisdiction are denied. The motion of Crang to dismiss for lack of personal jurisdiction is granted, and the motion of I.O.S. to dismiss, for lack of personal jurisdiction is denied. The motions by I.O.S. and Cornfeld to dismiss because of defective service of process are denied, as are their motions alleging a failure to prosecute. The motions seeking dismissal on grounds of comity and *forum non conveniens* are denied as is I.O.S.'s motion for a stay of proceedings. So ordered.—Carter, J.
- On request for certification: The request that the determination in respect of subject matter jurisdiction be certified for appeal pursuant to 28:1292(b) is granted. The determination that *in personam* jurisdiction is lacking as to deft. Crang is made final and entry of final judgment is ordered entered pursuant to Rule 54(b). However I do not regard the conclusion that *in personam* jurisdiction exists in respect of I.O.S. and Cornfeld as meeting the requisites for certification for reasons indicated herein. Accordingly the question is not certified for appeal.—Carter, J. m/n
- 12- 5-74 Filed order that a hearing shall be held on 3-21-75 at 10 A.M. for the purpose of determining whether the stipulation of settlement (the settling defendants: Banque Rothschild, Guinness Mahon & Co., Ltd., Hill Samuel & Co., Ltd., Lexerd & Co., Inc., Pierson, Heldring & Pierson, and Smith Barney & Co., Inc.) is fair, etc. Objecting class members to file prior to 3-6-75 written statements to the Clerk of the Court and serve copies as indicated. Notice to be given as indicated herein; the Settling Defendants shall cause to be filed in this Court, on or before the date of this hearing, proof of mailing and publication as herein provided.—Carter, J. m/n



4 A

DATE	PROCEEDINGS
12-13-74	Filed order that the application of Andersen for a stay pending appeal is in all respects denied. —Carter, J. m/n
12-16-74	Filed IOS's affdvt. and notice of motion for reargument—ret. 12-23-1974.
12-17-74	Filed deft. Bernard Cornfeld's affdvt. and notice of motion for reconsideration of decision filed on 11-27-74 or in the alternative certify issue for immediate appeal.—ret. 12-26-74.
12-17-74	Filed the following documents received from chambers:
	* * *
	Deft. Cornfeld's supplemental affdvts. of Marc Bonnant, Leonard M. Marks in connection with proceedings pending in Switzerland.
	* * *
1- 9-75	Filed deposition of deft. Arthur Andersen & Co. on 1-17-73. m/n
1- 8-75	Filed deposition of deft. Arthur Andersen & Co. on 8-29-73. m/n
1-14-75	Filed stipulation transmitting copy of unfiled document (stipulation of settlement submitted to court but not filed) to U.S.C.A.

## Complaint

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
HOWARD BERSCH,

Plaintiff,

Civil Action  
File No.

-against-

:

DREXEL FIRESTONE, INC., DREXEL  
HARRIMAN RITNEY, BANQUE ROTHSCHILD, :  
HILL SAMUEL & CO., LIMITED,  
GUINNESS MAHON & CO., LIMITED,  
PIERSON, HELDRING & PIERSON, :  
SMITH, BARNEY & CO. INCORPORATED,  
J. H. CRANG & CO., INVESTORS  
OVERSEAS BANK LIMITED, ARTHUR :  
ANDERSEN & CO., I.O.S., LTD., and  
BERNARD CORNFELD,

CLASS ACTION

COMPLAINT

PLAINTIFF DEMANDS  
: TRIAL BY JURY

Defendants.  
-----x

Plaintiff, by his attorney, Sidney B. Silverman, alleges upon information and belief, except for paragraph 1(a), which is alleged upon knowledge, as follows:

JURISDICTIONAL ALLEGATION

1. The Court's jurisdiction and the claims herein alleged are based upon the Securities Act of 1933 (15 USC §77(a) et seq.), including §§ 12, 15, 17 and 22 (15 USC §§ 77(1), 77(o), 77(q) and 77(v)), on the Securities Exchange Act of 1934 (15 USC §78(a) et seq.), including §§ 10(b), 15(c)(1), 20 and 2. (15 USC §§ 78j(b), 78o, 78t and 78aa), and on SEC Rule 10b-5 (17 CFR 240.10b-5, 15c1-2 (17 CFR 240.15c1-2) and the principles of pendent jurisdiction.

CLASS ACTION ALLEGATIONS  
PURSUANT TO CIVIL RULE 11A

2. (a) (i) In September, 1969, plaintiff purchased



The shares purchased by plaintiff were part of a public offering of 10,992,000 shares of IOS common stock (IOS Public Offering). The IOS Public Offering commenced in September, 1969, and the shares were sold to United States citizens residing in the United States and abroad and to foreign nationals.

(ii) Plaintiff brings this action individually and representatively on behalf of all persons who purchased IOS stock pursuant to the IOS Public Offering. Class members are estimated to approximate 100,000 persons.

(b) This action can be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

(c) Of the 10,992,000 shares offered to the public, 5,600,000 newly issued shares were offered directly by IOS (this offering is hereinafter referred to as IOS Primary Offering). The balance of 5,392,000 were offered by 490 IOS shareholders (this offering is hereinafter referred to as IOS Secondary Offering). Both the IOS Primary and Secondary Offerings were made upon the same terms and their closings were simultaneous. The three prospectuses, pursuant to which the IOS Public Offering was made, were substantially the same and the IOS common shares offered thereunder were all parts of the same class of stock. The firms that acted as principal underwriters in the IOS Primary Offering and in the IOS Secondary Offering, specifically designated below in this subparagraph "(c)" are hereinafter collectively

referred to as Participating Underwriters. All persons who purchased IOS common shares from the Participating Underwriters pursuant to the IOS Public Offering constitute the class on whose behalf this action is brought.

(i) Defendants Smith, Barney & Co., Incorporated (Smith Barney), Drexel Harriman Ripley, the predecessor of defendant Drexel, Firestone, Inc. (Drexel), Banque Rothschild (Rothschild), Hill Samuel & Co., Limited (Hill Samuel), Guinness Mahon & Co., Limited (Guinness Mahon), and Pierson, Heldring & Pierson (Pierson Heldring) were the principal underwriters of the IOS Primary Offering.

(ii) Defendants J. H. Crang & Co. (Crang) and Investors Overseas Bank Limited (Overseas Bank) were the principal underwriters of the IOS Secondary Offering.

(d) Plaintiff will fairly and adequately protect the interests of the class. His claim is typical of the claim which any class member can assert, and his interest does not conflict with the interest of any other class member.

(e) Questions of law and fact common to the class include: (i) whether defendants committed, conspired to commit, participated in or condoned, acts, or are chargeable with omissions to act, which constituted violations of the full disclosure and antifraud provisions of the National Securities Laws, including (A) the use by defendants of the United States mails and other instrumentalities of interstate



commerce to offer and sell securities by means of false and misleading prospectuses; and (B) the use by defendants of "gun-jumping," "market priming," and other fraudulent, deceptive or manipulative devices; and (ii) the extent to which class members were adversely affected thereby. Such common questions predominate over any questions affecting only individual members of the class.

(f) A class action is superior to other available methods for the fair and efficient adjudication of the controversy because (i) the class members individually sustained relatively small losses and hence would have little interest in individually controlling the prosecution of separate actions; (ii) no class member has as yet commenced an action, so that a class action will not deprive a class member of any rights; (iii) the management of this action as a class suit is not likely to encounter substantial difficulties which would outweigh the advantages of a class suit.

(g) The wrongful activities complained of occurred in substantial part within the Southern District of New York, including (i) the preparation of the false and misleading prospectuses by the New York law firms of Willkie Farr & Gallagher and Shearman & Sterling for the issuers and Participating Underwriters, respectively; (ii) the dissemination of the prospectuses; (iii) the sale of IOS stock in the IOS Public Offering; and (iv) the acts constituting "gun-jumping" and "market priming."

SUBSTANTIVE ALLEGATIONS

3. (a) Defendants Drexel and Smith Barney are broker-dealers registered with the Securities and Exchange Commission (SEC). They maintain offices in the City, County and State of New York.

(b) Defendants Rothschild, Hill Samuel, Guinness Mahon, Pierson Heldring, and Overseas Bank are foreign-based banks engaged in both commercial and investment banking. Each of them transacts a business in securities within the Southern District of New York.

(c) Defendant Crang is a Canadian brokerage firm, with its principal office in Toronto, Ontario. Defendant Crang transacts a business in securities within the Southern District of New York.

(d) Defendant Arthur Andersen & Co. (Andersen) is an international firm of accountants. It maintains an office within the City, County and State of New York.

(e) Defendant IOS is an international sales and financial services organization, principally engaged in the sale and management of mutual funds and other complementary financial activities. IOS was incorporated as a Panamanian corporation in 1960 and reconstituted as a Canadian corporation in June, 1969. IOS directly and through subsidiaries transacts a business in securities within the jurisdiction of the Southern District of New York.

(f) Defendant Bernard Cornfeld was the chief executive officer, Chairman of the Board of Directors, and largest



shareholder of IOS at the time of the IOS Public Offering. By virtue of his executive position and stockholdings, he controlled IOS at that time. Defendant Cornfeld is a citizen of the United States and maintained, at the time of the IOS Public Offering, a residence within the Southern District of New York.

4. In 1969, a group of IOS shareholders wanted to sell their holdings in IOS to the public. In order for this group to effectively sell their shares, it was desirable that IOS concurrently sell shares to the public. A plan was adopted calling for IOS and the IOS shareholders to sell a combined total of 10,992,000 shares.

5. The prospectuses pursuant to which the IOS Public Offering was made were prepared by American law firms, the United States mails and other means and instrumentalities of interstate commerce were used in their preparation and dissemination, and the offering was fully publicized in the United States. American citizens residing here, including plaintiff Bersch, purchased stock in the IOS Public Offering in the United States in reliance upon prospectuses which were false and misleading as hereinafter alleged and were damaged thereby.

6. Over 3,000,000 shares of the IOS Public Offering were sold in the Canadian securities markets. The sales were preceded by a massive public relations campaign in Canada and in the United States. Sales in Canada resulted in a spillover, since many Americans purchase and sell securities there. The defendants knew or should have known

that by establishing a market in Canada for IOS common stock and by publicizing the offering in Canada and the United States, they would cause many Americans to purchase IOS shares in the IOS Public Offering and in the aftermarket. Thus, the IOS Public Offering had and could reasonably have been expected to have an impact upon the United States investing public.

7. The IOS shares were offered at \$10 per share and within six months these shares were virtually valueless. This offering was the second largest equity financing in the world. The magnitude of the offering and the well publicized scandal that followed in its wake resulted in an adverse effect upon the securities markets throughout the world, including the United States markets.

8. In order to achieve the massive distribution of more than 10 million shares, the IOS Group solicited many of the world's leading investment banking firms. Some of these firms, including Kuhn Loeb & Co., N. M. Rothschild and Sons of London, S. G. Warburg and Hambros Limited, refused to participate in a public distribution of IOS stock (these firms are hereinafter referred to as Non-Participating Underwriters), recognizing that IOS was in a precarious financial position and that the ethics and standards of business morality set by its management fell far below those considered acceptable in established business circles.

9. The Participating Underwriters knew the facts which influenced the Non-Participating Underwriters to turn down



the IOS Public Offering but disregarded them. These underwriters, by selling almost 11 million shares of IOS stock at an aggregate price in excess of \$110 million, without revealing the true state of IOS' financial condition and management impliedly represented to the public that IOS was a suitable company for public ownership. The aforestated implied representations were false and misleading, as set forth in paragraph 10.

10. The prospectuses failed to reveal the following material facts:

(a) IOS, its managers and employees, in open and flagrant violation of the restrictive currency laws of many underdeveloped nations, participated in smuggling activities which removed currency worth many hundreds of millions of dollars from these countries. The illegal activities engaged in by IOS, its managers and employees, were notorious and resulted in prohibitions against IOS' continued operations in these countries.

(b) Many officers, directors and employees of IOS used the funds and credit of IOS for their own personal use and without regard to the needs of IOS. These activities depleted IOS' treasury so that by September, 1969, IOS had a severe liquidity problem.

(c) The books and records of IOS and its subsidiaries and affiliates were in chaotic condition. It was impossible to determine from them an accurate picture of IOS' current financial position.

(d) Administrative, travel and entertainment charges were exorbitant and not subject to adequate internal controls. For example, one party alone cost \$500,000. These unduly excessive charges were wasteful of IOS' assets.

(e) Various IOS officials engaged in violations of the antifraud provisions of the National Securities Laws, particularly "gun-jumping" and "market priming." During the months preceding the IOS Public Offering, these officials, including defendant Cornfeld, touted IOS' prospects at press conferences, in brochures, at meetings of financial analysts' societies and on television.

(f) Defendant IOS, during the period March to October 1968, through subsidiaries, acquired and held gold with a value of over \$37,000,000 without a license in violation of United States law. The United States government has sought a fine of \$62,394,000 against IOS for its gold violations.

11. The Participating Underwriters knew or should have known the facts set forth in paragraph 10.

12. The Participating Underwriters disseminated prospectuses through the United States mails and other means and instrumentalities of interstate and foreign commerce. They failed to use due diligence in connection with the preparation of these prospectuses. As a result, the prospectuses were false and misleading in the following respects:

(a) The prospectuses portrayed IOS as a highly profitable, rapidly growing and law abiding financial services



organization. In fact, however, IOS was having liquidity problems, was engaged in illegal activities, and its rate of growth had begun to decline.

(b) The prospectuses stated that sales and advisory functions performed by IOS for its mutual funds contributed 37% of IOS' profits for the first-half of 1969. This statement was false or materially incomplete because IOS lost almost \$5 million in that period from its sales activities. Additionally, IOS could reasonably expect to sustain even more substantial losses from this activity since its share of the sales commission had been reduced. Prior to 1969, IOS retained 2% of the 8-1/2% sales commission charged on mutual fund sales, remitting the remaining 6% to its salesmen. In 1969, IOS reduced its share to 1-1/2%, thereby decreasing its revenues from sales by 25%. The prospectuses omitted to state that sales activity prior to the reduction resulted in substantial operating losses and that such losses could be anticipated to increase in the future as a result of the reduction.

13. Had the Participating Underwriters used due diligence, the prospectuses would not have been false and misleading in the respects enumerated above, but would have instead contained information from which investors could have made an informed judgment whether to purchase IOS stock.

14. Defendant Andersen failed to observe generally accepted accounting principles in connection with its audit of

IOS. As a result, the prospectuses, which contained financial statements of IOS certified by Andersen, were false and misleading in the following respects:

(a) IOS had sustained a substantial loss as a result of loans made to Commonwealth United Corporation. The financial statement failed to report this loss.

(b) IOS' gross revenues from sales of mutual funds were to be adversely affected by a change in commission allocation (see paragraph 12(b)). The financial statements failed to state this fact.

(c) The financial statements failed to reveal that IOS' lack of liquidity made it impossible for it to meet its obligations as they arose and that at the time of the IOS Public Offering, IOS was insolvent.

(d) The financial statements certified by defendant Andersen spoke as of the year ended December 31, 1968. IOS' financial position varied with fluctuations in the various financial markets of the world, thus making up-to-date financial statements essential in order properly to evaluate IOS as an investment. Since the IOS Public Offering was not to take place for nine months after the close of the year, defendant Andersen knew or should have known that its certified statements were not current and should not be used in connection with the IOS Public Offering. Nevertheless, defendant Andersen permitted the use of its certified statements in the prospectuses issued in connection with the IOS Public Offering.



15. Defendant Andersen should have withheld its certification of IOS' financial statements in view of the chaotic state of IOS' business records. Defendant Andersen, by certifying the financial statements as being prepared in accordance with generally accepted accounting principles and by permitting their use in connection with the prospectuses, represented that IOS maintained proper books and records, that IOS would continue as a going concern, that no subsequent events had been discovered which would affect the accuracy, relevance and interpretation of the certified financial statements, that the financial statements certified were as current as was appropriate for the business IOS was in, for inclusion in a prospectus, and were accurate. These representations, for reasons already stated, were false and misleading.

16. In the months prior to a contemplated public offering, an issuer should and usually does maintain a well-guarded silence. The purpose of this practice is to prevent excitement for a public offering based on chance remarks or incomplete brochures or pamphlets. IOS and its senior officers, prior to and in preparation for the public offering, made glowing statements concerning IOS and its future. IOS was referred to as "the most important force in the free world" and it was often estimated that IOS, by 1975, would have \$15 billion under its management.

17. Defendants IOS and Cornfeld knowingly and wilfully committed the aforescribed fraudulent and deceptive acts

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and participated in the preparation and dissemination of the false and misleading prospectuses, thereby causing injury to the class. These acts and false prospectuses were in furtherance of a scheme to use established New York financial institutions to lend credibility to and thereby effect the IOS Public Offering. They are accordingly liable to the class for its damages.

18. (a) The Participating Underwriters violated the disclosure and antifraud provisions of the National Securities Laws by distributing through the mails and by other means of interstate commerce, the false prospectuses used in the IOS Public Offering.

(b) The Participating Underwriters knew that defendant IOS and its senior officers had engaged in "gun-jumping" and "market priming" activities. By participating in the IOS Public Offering with knowledge of these facts, they aided and abetted the defendants IOS and Cornfeld in their scheme to defraud the class.

(c) The Participating Underwriters are jointly and severally liable for the damages sustained by the class.

19. Defendant Andersen did not make a reasonable investigation and did not have reasonable ground to believe that the financial statements certified by it were not false and misleading. Nevertheless, it permitted their inclusion in the prospectuses. Accordingly, defendant Andersen is jointly and severally liable for the damages sustained by the class.



and participated in the preparation and dissemination of the false and misleading prospectuses, thereby causing injury to the class. These acts and false prospectuses were in furtherance of a scheme to use established New York financial institutions to lend credibility to and thereby effect the IOS Public Offering. They are accordingly liable to the class for its damages.

18. (a) The Participating Underwriters violated the disclosure and antifraud provisions of the National Securities Laws by distributing through the mails and by other means of interstate commerce, the false prospectuses used in the IOS Public Offering.

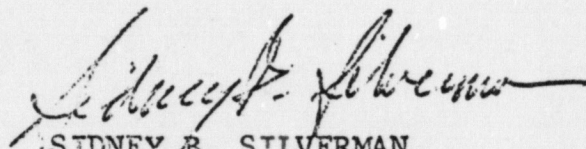
(b) The Participating Underwriters knew that defendant IOS and its senior officers had engaged in "gun-jumping" and "market priming" activities. By participating in the IOS Public Offering with knowledge of these facts, they aided and abetted the defendants IOS and Cornfeld in their scheme to defraud the class.

(c) The Participating Underwriters are jointly and severally liable for the damages sustained by the class.

19. Defendant Andersen did not make a reasonable investigation and did not have reasonable ground to believe that the financial statements certified by it were not false and misleading. Nevertheless, it permitted their inclusion in the prospectuses. Accordingly, defendant Andersen is jointly and severally liable for the damages sustained by the class.

WHEREFORE, plaintiff prays for judgment against defendants, as follows:

- (a) Damages for losses sustained or to be sustained;
- (b) Restitution, rescission or rescissional damages;
- (c) An accounting for the profits made by defendants;
- (d) An award of costs, including attorney's and accountant's fees; and
- (e) Such other and further relief as may be just and proper.



SIDNEY B. SILVERMAN,  
Attorney for Plaintiff  
233 Broadway  
New York, N. Y. 10007  
267-6370



## Answer of Arthur Andersen &amp; Co.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL  
 HARRIMAN RIPLEY, BANQUE ROTHSCHILD,  
 HILL SAMUEL & CO., LIMITED,  
 GUINNESS MAHON & CO., LIMITED,  
 PIERSON, HELDRING & PIERSON,  
 SMITH, BARNEY & CO. INCORPORATED,  
 J. H. CRANG & CO., INVESTORS  
 OVERSEAS BANK LIMITED, ARTHUR  
 ANDERSEN & CO., I.O.S., LTD., and  
 BERNARD CORNFELD,

Defendants.

----- x

Defendant ARTHUR ANDERSEN & CO. ("Andersen"), by  
 its attorneys BREED, ABBOTT & MORGAN, for its answer to the  
 complaint:

1. It denies the averments of paragraph 1, except  
 admits that plaintiff has instituted this action in purported  
 reliance on the statutes of the United States set forth in said  
 paragraph.

2. It denies the averments of paragraph 2, and will  
 set forth its position with respect thereto in response to the  
 motion required to be made by plaintiff, pursuant to Civil Rule  
 11A, subdivision (c), except that it is without knowledge or  
 information sufficient to form a belief as to the truth of the  
 averments that in September, 1969, plaintiff purchased 600  
 shares of the common stock of defendant I.O.S., Ltd. ("IOS"),

and that shares of IOS were sold to United States citizens residing in the United States and abroad.

3. It is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 3, except that it admits that defendant Andersen is a firm of accountants, and that it maintains an office within the City, County and State of New York, but alleges that the audit engagements involved in the averments of the complaint were entered into by Andersen's branch office in Switzerland, which was in charge of such audit; and it further admits that IOS was engaged in the sale and management of mutual funds and other financial activities outside the United States; that IOS was incorporated as a Panamanian corporation in 1960; that IOS was formed as a Canadian corporation in June, 1969; and that defendant Bernard Cornfeld was the Chairman of the Board of Directors and the Chief Executive Officer of IOS at the time of the offering of shares of IOS.

4. It is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4 of the complaint.

5. It denies the averments of paragraph 5.

6. It denies the averments of paragraph 6 insofar as they may purport to relate to defendant Andersen; it further denies that the offering of shares of IOS in September, 1969, had or could reasonably have been expected to have an impact upon the United States investing public or that Americans were caused to purchase IOS shares in the offering or in the aftermarket; and it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of said paragraph.



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7. It denies the averments of paragraph 7, except that it admits that the offering price stated in the prospectuses was \$10.00 per share.

8. It is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8, except that it denies that IOS was in a precarious financial position at the time referred to in said paragraph, or that the ethics and standards of business morality of the management of IOS were as averred in said paragraph.

9. It denies the averments of paragraphs 9, 10, 11, 12, 13, 14 and 15.

10. It is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 16.

11. It denies the averments of paragraphs 17, 18 and 19.

First Defense

The Court lacks jurisdiction over the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted against defendant Andersen.

Third Defense

The liability, if any, of defendant Andersen with respect to the matters alleged in the complaint is not governed by the laws of the United States, but by the laws of various foreign countries. Under such foreign laws, the complaint fails to state a claim upon which relief can be granted against said defendant.

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Fourth Defense

The action should be dismissed on the ground of improper venue.

Fifth Defense

This Court should decline to exercise jurisdiction under the doctrine of forum non conveniens.

Sixth Defense

The claims alleged in the complaint are barred in whole or in part by the applicable statute or statutes of limitations.

Seventh Defense

The claims alleged in the complaint are barred in whole or in part by laches.

Eighth Defense

To the extent that any part of a prospectus, which relates to a matter which is part of the claim sought to be alleged against defendant Andersen, may be found to be untrue, or to have included an untrue statement of a material fact, or to have omitted to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made not misleading, or may otherwise have constituted material omissions from such prospectus, defendant Andersen did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

Ninth Defense

To the extent that any part of a prospectus, which relates to a matter which is part of the claim sought to be alleged against defendant Andersen, may be found to be untrue, or to constitute material omissions, defendant Andersen, after



reasonable investigation, had reasonable ground to believe and did believe, at the time the prospectus was issued, that such matters were true, and that there was no omission to state a material fact required to be stated therein or necessary in order to make the statements therein not misleading.

Tenth Defense

To the extent that any part of a prospectus, which relates to a matter which is part of the claim sought to be alleged against defendant Andersen, may be found to be untrue, or to constitute material omissions, and such matters were based on the authority of an expert, including other auditors, defendant Andersen had no reasonable ground to believe, and did not believe, at the time the prospectus was issued, that such matters were untrue, or that there was any omission to state a material fact required to be stated therein or necessary in order to make the statements therein not misleading, or did not fairly represent the statement of the expert or other auditors.

Eleventh Defense

To the extent that any part of a prospectus, which relates to a matter which is part of the claim sought to be alleged against defendant Andersen, may be found to be untrue, or to constitute material omissions, plaintiff knew, or in the exercise of reasonable care or diligence could have known, of such untruth or omission.

Twelfth Defense

To the extent that any part of a prospectus, which relates to a matter which is part of the claim sought to be alleged against defendant Andersen, may be found to be untrue,

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or to constitute material omissions, all of the damages allegedly incurred by plaintiff and by the members of the purported class purportedly represented by plaintiff represents other than the depreciation in value of common shares of I.O.S., Ltd. resulting from such untruths or omissions.

WHEREFORE, defendant Arthur Andersen & Co. demands judgment against plaintiff dismissing the complaint, together with the costs and disbursements of this action, including attorneys fees.

Dated, New York, New York  
January 14, 1972

BREED, ABBOTT & MORGAN

By



EDWARD J. CROSS

1 Chase Manhattan Plaza  
New York, New York 10005  
Attorneys for Defendant  
Arthur Andersen & Co.  
944-4800

Of Counsel,

Charles W. Boand, Esq.  
George W. Thompson, Esq.  
Wilson & McIlvaine  
135 South LaSalle Street  
Chicago, Illinois 60603



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Interrogatories to Plaintiff

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
HOWARD BERSCH, :  
 : 71 Civ. 5373  
Plaintiff, :  
 : INTERROGATORIES TO  
-against- : PLAINTIFF  
 : RELATING TO DETER-  
DREXEL FIRESTONE, INC., et al., : MINATION OF CLASS  
 : ACTION QUESTIONS  
Defendants. :  
----- x

Defendants Drexel Firestone, Inc., Smith, Barney & Co., Incorporated and Arthur Andersen & Co. request that plaintiff Howard Bersch answer the following interrogatories separately and fully in writing under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure.

Interrogatory 1.

State your full name, any other names or pseudonyms you have ever used, and your date of birth.

Interrogatory 2.

State the full address of each place of residence from January 1, 1967 to the present and the period during which such residence was maintained, and indicate each principal place of residence, if any, and the period during which it was your principal place of residence.

Interrogatory 3.

State, for each calendar year from January 1, 1967 to December 31, 1971, the approximate number of days which you spent (a) in the United States, and (b) outside the United States.

Interrogatory 4.

State, for each calendar year or other tax return period from January 1, 1967 to December 31, 1971, the name of each country, state of the United States, and province of Canada to which you paid income taxes or in which you filed an income tax return and, with respect to each, whether you paid the tax or filed the return (a) as a resident, or (b) as a nonresident.

Interrogatory 5.

Identify each country of which you are presently a citizen or national and, with respect to each, the date upon which you became a citizen or national.

Interrogatory 6.

Identify each country of which you have been a citizen or national and, with respect to each, the date upon which you became a citizen or national and the date upon which you ceased being a citizen or national.

Interrogatory 7.

State with respect to the period from January 1, 1967 to December 31, 1971:

(a) Each occupation in which you were engaged and, with respect to each, the portion of the year during which you pursued such occupation and the titles you held, if any; and

(b) with respect to each occupation identified in subpart (a) of this interrogatory, state your principal place or places of business (including full address and name of firm or business or other entity with which associated).



Interrogatory 8.

State whether you now hold or have ever held a position as a director, officer, employee, salesman, consultant, or agent of I.O.S., Ltd., its subsidiaries or affiliates or a predecessor company of any of them (hereinafter collectively referred to as "IOS") or of any fund related to IOS.

Interrogatory 9.

If your answer to interrogatory 8 is yes, state with respect to each such position:

- (a) the company with which such position was held;
- (b) the exact title of such position;
- (c) the specific duties of such position and the nature of any other work you performed in such position;
- (d) the names, exact titles and specific duties of all supervisors or other persons to whom you directly reported when in such position;
- (e) the exact dates on which such position began and ended;
- (f) the full address of all places of business during the time you occupied such position;
- (g) your compensation derived from such position, stated separately for each calendar year, including a separate statement with respect to each salary and stock option given to you, and each award and bonus earned by you or given to you on the basis of your performance;
- (h) whether your position was described in a written agreement or agreements and, if so, the substance thereof;

(i) whether you possess the originals or copies of said agreement or agreements identified in your answer to interrogatory 9(h) and, if not, the location and custodian of the original or copies of said agreement or agreements;

(j) whether you ever resigned from such position and, if so, the date of such resignation, the severance payment received by you upon such resignation, and the reason for such resignation; and

(k) whether you were dismissed for cause from such position, and, if so, the date and cause of such dismissal.

Interrogatory 10.

State whether any person ever related to you by blood or marriage, or any present or former friend or close acquaintance of yours, now holds or has ever held a position of employment, agency, or other compensated relationship with IOS.

Interrogatory 11.

If your answer to interrogatory 10 is yes, state with respect to each such person:

- (a) his name;
- (b) his full present address, and any previous addresses known to you;
- (c) if related to you by blood or marriage, the exact nature of his relationship to you;
- (d) if a friend or close acquaintance, the date on which your friendship or acquaintance with such person began and the approximate number of occasions on which you met with or spoke to such person during 1969: and



(e) the exact nature and specific duties of each such position held by such person.

Interrogatory 12.

State whether anyone has ever at any time solicited the purchase by you of any common shares of IOS.

Interrogatory 13.

If your answer to interrogatory 12 is yes, identify separately with respect to each solicitation:

- (a) the person who made the solicitation;
- (b) the date of such solicitation;
- (c) the manner of such solicitation (i.e., by mail, telephone, in person or otherwise);
- (d) the physical location of the soliciting person at the time such solicitation was made; and
- (e) your physical location at the time such solicitation was made.

Interrogatory 14.

State separately with respect to each solicitation identified in your answer to interrogatory 13 whether any writings were received by you at any time in connection with the solicitation.

Interrogatory 15.

If your answer to interrogatory 14 is yes, identify separately with respect to each writing received:

- (a) the date and title of the document, the persons or entities whose names appear in it as apparently or actually having prepared it, and the substance thereof;

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(b) the solicitation identified in your answer to interrogatory 13 in connection with which the writing was received;

(c) the manner in which you were given the writing (i.e., by mail, in person, by messenger or otherwise);

(d) the date you received the writing;

(e) if the writing was given to you in person, your physical location at the time it was given to you, and the individual person who gave it to you;

(f) if the writing was sent to you by mail, the date and place of postmark, the full address to which it was mailed, the full return address, and the individual person who sent it to you; and

(g) if the writing was given or sent to you other than in person or by mail, the individual person who gave or sent it to you and his physical location, and your physical location at the time you received it.

Interrogatory 16.

State whether you have ever at any time solicited the sale to you of any common shares of IOS or in any way initiated a purchase or proposed purchase transaction.

Interrogatory 17.

If your answer to interrogatory 16 is yes, state with respect to each such occasion:

(a) the person whom you solicited or otherwise approached;

(b) the date of such solicitation or initiation;



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(c) the manner of such solicitation or initiation (i.e., by mail, telephone, in person or otherwise);

(d) your physical location at the time of such solicitation or initiation;

(e) the physical location of the person solicited or approached at the time of such occurrence;

(f) the substance of any oral statements you made to such person at the time of such occurrence;

(g) whether any writings were distributed by you or received by you in connection with such solicitation or initiation; and

(h) if your answer to interrogatory 17(g) is yes, identify the date and title of each such writing, the persons or entities who prepared them, and the substance thereof.

Interrogatory 18.

State whether you have ever participated in the IOS Stock Option Plan and whether you have ever otherwise owned options to purchase shares of IOS.

Interrogatory 19.

If your answer to interrogatory 18 is yes, state:

(a) the date when you first became eligible for the Plan;

(b) the date each and every stock option was given to or earned by you pursuant to the Plan;

(c) whether any written agreement or agreements contained terms relating to your participation in the Plan and, if so, the substance thereof;

(d) whether you possess the originals or copies of said agreement or agreements identified in your answer to interrogatory 19(c) and, if not, the location and custodian of the original or copies of said agreement or agreements; and

(e) whether you exercised any of said stock options and, if your answer is yes, the date of each and every time you exercised each and every such option, the price per share at which you exercised each and every such stock option, and the number of shares purchased per each exercise of said stock options.

Interrogatory 20.

State whether you have ever owned any stock or other interest in IOS other than the common stock of I.O.S., Ltd.

Interrogatory 21.

If your answer to interrogatory 21 is yes, identify separately with respect to each interest:

(a) the company in which such stock or other interest was or is held;

(b) the class of stock or other type of interest held;

(c) the number of shares or amount of interest held; and

(d) the date such shares or other interest were acquired.



Interrogatory 22.

State whether you have ever at any time purchased any common shares of IOS.

Interrogatory 23.

If your answer to interrogatory 22 is yes, state separately with respect to each purchase:

(a) your principal place of residence at the time of such purchase;

(b) whether you were, at the time of such purchase, aware of a consent order regarding I.O.S., Ltd. entered by the Securities and Exchange Commission on May 23, 1967;

(c) the date the purchase order was placed, the number of shares purchased, and the price per share;

(d) whether the purchase resulted from the exercise of any option identified in your answer to interrogatory 19 and, if so, which of the options identified was involved;

(e) whether your purchase order was solicited or whether your purchase resulted from a solicitation or other initiation by you, and which of the occurrences identified in your answers to interrogatories 13 and 17 relates to the purchase;

(f) the individual person, if any, who placed the order on your behalf, and the manner in which you instructed such person to place the order (i.e., by mail, telephone or otherwise) and your physical location at the time you gave or sent him such instructions;

(g) the person with whom such order was placed by you or by the person identified in your answer to interrogatory 23(e) as having acted on your behalf;

(h) the person or entity from whom the shares were purchased;

(i) the person or entity from whom the purchaser identified in your answer to interrogatory 23(h) acquired the shares, and all other purchasers appearing earlier in the chain of title;

(j) each other individual person and entity involved in the transaction, including his or its full address and capacity in which each such other individual person or entity acted (i.e., whether as principal, agent or broker and for whom);

(k) the stock exchange, if any, through which the purchase was consummated;

(l) the manner in which the purchase was confirmed, including a description of any confirmation documents received and identification of the physical location of the person sending them to you at the time they were sent;

(m) the date upon which you paid for the shares;

(n) the manner in which you paid for the shares (i.e., by check, cash, money order or otherwise); if other than by cash, identify the bank or other entity upon which the instrument was drawn and the person or entity to whom such instrument was drawn or payable;

(o) the person to whom payment was given (if payment was made by you to a person acting on your behalf, identify not only such person but also the



person to whom the person acting on your behalf made payment);

(p) the manner of delivery of payment (i.e., in person, by mail or otherwise), your physical location at the time, the physical location of any agent making payment on your behalf, and the physical location of the person to whom payment was made;

(q) the date upon which the certificate representing the shares were delivered to you or to any person acting on your behalf;

(r) whether the certificates originally received by you or a person acting on your behalf were bearer share certificates, bearer share warrants or registered share certificates;

(s) the date of each certificate;

(t) the person in whose name each certificate was issued, each person shown as transferee or assignee, and the dates of such transfers or assignments;

(u) the manner of delivery of the certificates (i.e., in person, by mail or otherwise), your physical location at the time, the physical location of any agent receiving delivery on your behalf, and the physical location of the person making delivery to you or your agent;

(v) if the certificates received were registered share certificates, whether such shares were subsequently exchanged for bearer share warrants and, if so, the date of such exchange, the transfer agent to whom application was made and the number and date of each bearer share warrant received in exchange;

(w) if the certificates received were bearer share warrants, whether such warrants were subsequently exchanged for registered share certificates and, if so, the date of such exchange, the transfer agent to whom application was made and the number and date of original issue shown on each registered share warrant received in exchange;

(x) whether you or any person acting on your behalf paid any United States interest equalization tax in connection with the purchase and, if so, the date of said payment; and

(y) whether you or any person acting on your behalf made any representation, written or oral, to the seller of the shares as to your name, nationality or country of residence, and, if your answer is yes, the date of such representation, the individual person to whom made, whether made orally or in writing, and the name, nationality and country of residence so represented.

Interrogatory 24.

Identify all writings relating or referring to the transactions which are described in your answer to interrogatory 23.

Interrogatory 25.

State whether you have ever received a prospectus offering common shares of IOS.

Interrogatory 26.

If your answer to interrogatory 25 is yes, state separately with respect to each such prospectus:



38 A

- (a) the date of the prospectus;
- (b) the number of IOS common shares the prospectus states were offered by it;
- (c) the underwriter or underwriters named on the first or cover page of the prospectus;
- (d) the language in which the prospectus is written;
- (e) the date you received the prospectus;
- (f) the individual person who gave you the prospectus;
- (g) whether such prospectus was given to you in connection with any of the transactions identified in your answer to interrogatory 23, and, if so, which transaction or transactions.

Interrogatory 27.

With respect to each purchase referred to in your answer to interrogatory 23, state whether you subsequently disposed of said shares.

Interrogatory 28.

If your answer to interrogatory 27 is yes, state separately with respect to each sale:

- (a) the date of such sale or other disposition;
- (b) the person to whom said shares were sold;
- (c) the number of shares sold;
- (d) the price per share;
- (e) the stock exchange, if any, through which the transaction was consummated; and
- (f) share certificate numbers.

Interrogatory 29.

State with respect to each prospectus referred to in paragraph 2(c) of the complaint in this action:

(a) whether you assisted in the preparation of such prospectus and, if so:

(i) the nature and extent of your assistance;

(ii) the names of the persons at IOS with whom you consulted; and

(iii) the names of the persons who supervised your performance;

(b) whether you received and reviewed any portions of said prospectus to determine or assist in determining its accuracy and, if so, state by page number those portions so received; and

(e) whether you ever met with any officer, director or representative of the firm or firms listed as underwriter or underwriters on said prospectus and, if so, the date and place of each such meeting and the names of the persons with whom you met.

Dated: New York, New York  
January 13, 1972

SULLIVAN & CROWELL

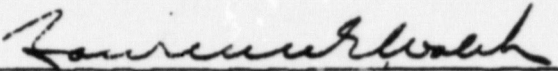
By

*Marion Schwartz*

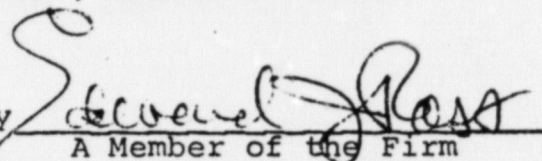
A Member of the Firm  
Attorneys for Defendant  
Drexel Firestone, Inc.,  
48 Wall Street,  
New York, New York 10005  
Tel. HAnover 2-8100



DAVIS POLK & WARDWELL

By   
 A Member of the Firm  
 Attorneys for Defendant  
 Smith, Barney & Co., Incorporated,  
 One Chase Manhattan Plaza,  
 New York, New York 10005  
 Tel. 422-3400

BREED, ABBOTT & MORGAN

By   
 A Member of the Firm  
 Attorneys for Defendant  
 Arthur Andersen & Co.,  
 One Chase Manhattan Plaza,  
 New York, New York 10005  
 Tel. 944-4800

Of Counsel to Defendant Arthur Andersen & Co.:

Charles W. Board, Esq.  
 George W. Thompson, Esq.  
 Wilson & McIlvaine,  
 135 South LaSalle Street,  
 Chicago, Illinois 60603

TO: SIDNEY B. SILVERMAN, ESQ.,  
 233 Broadway,  
 New York, New York 10007

## Plaintiff's Answers to Interrogatories

BY MAIL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

FEB 8 1972

HOWARD EERSCH,

Plaintiff, :

-against-

ANSWERS TO  
INTERROGATORIES

DREXEL FIRESTONE, INC., et al., :

Defendants.

Howard Bersch, as and for his answers to the interrogatories served by defendants Drexel Firestone, Inc., Smith, Barney & Co., Inc., and Arthur Andersen & Co., states as follows:

1. Howard William Bersch.

6/19/38.

2. 1052 East 26th Street, Brooklyn, N. Y. 11210.

3. From 1967 to December 31, 1971, approximately 130 to 344 days within the United States, and the balance outside the United States.

4. United States of America and New York State.

5. 6/19/38, United States of America.

6. Same as "5."

7. (a) & (b) 1/10/66 - 3/31/69.

Investors Planning Corporation of  
America (IPC).

No title.

60 East 42nd Street



4/1/69 - 10/1/70.

42A

Saja Associates, Ltd. (Saja).

Vice-President and Secretary.

444 Madison Avenue.

460 Park Avenue.

10/1/70 - 4/1/71.

Self employed.

4/1/71 - 10/1/71.

The Harvey Group, Inc.

Assistant to the President

375 Park Avenue.

10/1/71 - 12/31/71.

Treasurer and Director of Planned  
Programs, Inc.

1140 Avenue of the Americas.

8. Yes.

9. (a) IPC; Saja.

(b) See answers to 7(a) & (b), supra.

(c) With respect to IPC, I served as assistant to the senior Vice-President and performed administrative duties. With respect to Saja, I performed administrative duties.

(d) Robert F. Sutner.

Senior Vice-President of IPC, Chairman of the

(e) and (f) See answers to 7(a) and (b).

(g) IPC \$10,000 to \$19,000. I participated in the equity bonus plan, which came into existence in 1968. My participation had a value of \$2,500. Saja \$19,000 to \$22,500. I was told that if and when IOS went public, I would have the right to subscribe to 600 shares at the public offering price.

(h) No written agreements.

(i) Inapplicable.

(j) Resigned from IPC to join Saja; no severance pay. Resigned from Saja when duties came to an end; three months' severance pay.

10. Yes.

11. (a) Elliott Adler.

(b) 11 Chester Terrace, London N.W. 1, England.  
1 Adams Street, East Rockaway, New York.

(c) Mr. Adler is married to my sister.

(d) Inapplicable.

(e) Vice-President, ILI Luxemburg.

12. Yes.

13. As an officer and employee of Saja, I was told that if and when IOS went public, I would have the right to subscribe to 600 shares at the public offering price. I was informed, prior to purchase, that a telephone call had been



received approving the allotment to me of 600 shares. The telephone call was made to Saje's office in New York. I was there at the time. I do not recall whether I was told the name of the person who telephoned, but in any event I do not recall his name.

14 and 15. Documents received by me in the mail in connection with my purchase of IOS stock are annexed hereto as Exhibit A. It is believed that these documents provide complete answers to interrogatories 14 and 15.

16. No.

17. Inapplicable.

18. Yes.

19. Annexed hereto and marked Exhibit B are the pertinent documents pertaining to my participation in the IOS stock option plan. I did not exercise my option thereunder.

20. No.

21. Inapplicable.

22. Yes.

23. (a) 1052 East 26th Street, Brooklyn, N. Y. 11210.

(b) Yes.

(c) September 3, 1969.

600 shares.

\$10 per share

(c) No.

(e) My purchase order was solicited. The entire answer to Interrogatory 13 relates to this purchase.

(f), (g) and (h) My physical location at time of order was New York. For all other information see Exhibit A.

(i) and (j) I have no knowledge or information concerning the identity of Mr. Cornfield's predecessor in interest or any other persons and entities involved in the transaction other than those referred to above.

(k) The purchase was not made through the facilities of a stock exchange.

(l) See Exhibit A.

(m) 9/3/69.

(n) Cashier Check No. 513269 issued by Chase Manhattan Bank.

(o) See Exhibit A.

(p) U. S. mails; New York.

(q) January 15, 1970.

(r) Registered shares.

(s) October 15, 1969.

(t) Howard Bersch.



(u) By mail to my home at 1052 East 26th Street, Brooklyn, N. Y. 10210. Annexed hereto and marked Exhibit C is a copy of my stock certificate.

(v) The certificate was a registered share certificate but was not exchanged for bearer share warrant

(w) Inapplicable.

(x) No. Interest equalization tax was not paid.  
See Exhibit A.

(y) Yes. See Exhibit A.

24. Exhibit A.

25. Yes.

26. There were three prospectuses which I read prior to completing my purchase of IOS common stock. The prospectuses were dated September, 1969 and were written in English. One prospectus listed Drexel Harriman Ripley Incorporated, Banque Rothschild, Guinness Mahon & Co. Limited, Hill Samuel & Co. Limited, Pierson, Haldring & Pierson, and Smith Barney & Co. as underwriters. This offering covered 5.6 million shares. A second prospectus named J. H. Crang & Co. as underwriter and covered approximately 1.45 million shares. The third named Investors Overseas Bank Limited as the underwriter and covered approximately 3.9 million shares.

None of the prospectuses were mailed to my home. One, I do not remember which, may have been mailed to me at my

27. No.

28. Inapplicable.

29. (a) No.

(b) No.

(c) [sic] No.

Dated: New York, N. Y.,  
February 1, 1972.

*Edward B. Lorch*

Edward B. Lorch,  
Plaintiff.

*John A. Lorch*

Notary Public

SIXTH AVENUE, NEW YORK, N.Y.  
Notary Public, State of New York  
No. 5111111111  
Qualified in New York State  
Commission Expires March 31, 1973



**EXHIBIT A**  
**COPY (FOR SUBSCRIBER'S USE)**

CHase Manhattan  
CL # 513289

**Reference :**

Name(s): Howard D. Smith

AN  
BERSCH

**\*Address\***

c/o SABA ASSOCIATES, LTD  
444 MADISON AVE  
NEW YORK, 10022  
U.S.A.

Maximum dollar  
amount which may  
be subscribed:  
US \$ 6,000.00

Please fill in this form and return the original copy with your remittance, in the envelope supplied, to: ~~XXXXXXXXXXXXXXXXXXXX~~  
 Limited, ~~XXXXXXXXXXXXXXXXXXXX~~ Juanita C. Torres  
 119 Rue de Lausanne Geneva

I hereby subscribe for that number of shares of the **Common Stock of I.O.S., Ltd.** which may be purchased at the public offering price for the amount indicated below and enclose a bank cashier's check for that amount payable to "INVESTORS OVERSEAS BANK LIMITED".

Amount of enclosed cashier's check:

\$ 6000.00

(in US dollars or a currency freely convertible into US dollars,  
but not more than the maximum dollar amount shown above.)

I am a citizen of

U.S.A  
(import country)

(Insert country of citizenship for second person if two names  
number above.)

Date \_\_\_\_\_

**Signature**

Date \_\_\_\_\_

Co-signature (Subscription must be signed by both persons if two names appear above.)

NOTE: Your share certificate will only be registered in the name(s) shown above. If you require the certificate to be forwarded to an address different from that shown above, please write the new address below. If the certificate is to be forwarded to a bank, also indicate your bank account number(s).

Forwarding address for share certificate if other than above:

Your remittance will be acknowledged within 21 days after the close of this offer and any amount remaining after the purchase of the highest possible whole number of shares at the public offering price will be refunded to you in US dollars if the amount is more than US \$ 3.00. Although the official English text of this subscription is binding, translations appear on the reverse side of the copy.

For office use only / Nur für internen Gebrauch / Unicamente para uso interno / Spazio riservato ai nostri uffici / Réservé à l'administration

[illegible]

**ACKNOWLEDGEMENT OF PURCHASE OF THE COMMON STOCK OF  
 BESTÄTIGUNG ÜBER DEN KAUF VON STAMAKTIEN DER  
 CONFIRMATION RELATIVE A L'ACHAT D'ACTIONNORDINAIRES D'  
 CONFIRMACION DE ADQUISICION DE ACCIONES ORDINARIAS DE  
 CONFERMA RELATIVA ALL'ACQUISTO DI AZIONI ORDINARIE DELLA**

**IOS OF LTD.**

PRICE PER SHARE U.S. \$ 10.00 24 SEPTEMBER 1959

REGISTRAR AND TRANSFER AGENT:  
 MONTREAL TRUST COMPANY  
 15 KING STREET WEST  
 TORONTO, CANADA

UNDERWRITERS:  
 INVESTORS OVERSEAS  
 BANK LIMITED  
 P.O. BOX 344  
 1211 GENEVA 1  
 SWITZERLAND

BERSCH, Howard

REMITTANCE RECEIVED / BETRAG ERHALTEN MONTANT RECU REMESA RECIBIDA RAPPORTO RICEVUTO		6,000.00
Bonus		- 0 -
NUMBER OF SHARES PURCHASED / ZAHL DER ERWORBENEN AKTIEN NOMBRE D'ACTIONNORDINAIRES ACQUIS NÚMERO DE ACCIONES ADQUIRIDAS NUMERO DI AZIONI ACQUISTATE		600
COST OF SHARES PURCHASED / KOSTEN DER ERWORBENEN AKTIEN COUT DES ACTIONNORDINAIRES ACQUIS COSTO DE LAS ACCIONES ADQUIRIDAS COSTO DELLE AZIONI ACQUISTATE		6,000.00
SWISS ISSUANCE TAX / SCHWEIZER STEUERLEGUNG AUF VERTRAPFERE IMPOT SUISSE SUR L'EMISSION DE TITRES IMPOSTA SVIZZERA SULL'EMISSIONE DI TITOLI		
AMOUNT DUE SUBSCRIBER / MONTANT REMBOURSABLE AU SOUSCRIPTEUR MONTANT A RENDRE AU TITULAIRE MONTANTE RENDENDENTE AL SOTTOSCRITTORE MONTANTE RENDENDENTE AL SOTTOSCRITTORE MONTANTE RENDENDENTE AL SOTTOSCRITTORE		

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## INVESTORS OVERSEAS SERVICES

January 15, 1970

Dear Shareholder:

I am pleased to send your I.O.S., Ltd. share certificate. We are sorry for the delay, but the fact of your U. S. citizenship occasioned time-consuming formalities with the Internal Revenue Service in order to reduce your tax liability. Now, certain action on your part is required to save you from tax liability under the Interest Equalization Tax Law. Your prompt attention to this letter and the enclosed forms will save you taxes.

Enclosed with your share certificate are the following documents:

Form 4322 - Validation Certificate of Prior American ownership and Interest Equalization Tax Compliance (copy 1 and copy 2)

Form 3780 - Interest Equalization Tax Quarterly Return

Form 4322 A - Application for Validation Certificate of Prior American ownership and Interest Equalization Tax Compliance

With respect to each of the above, it is most important that you carefully follow these instructions:

Copy 1 of Validation Certificate:

Line 21 -- type or print your name and present address.

Copy 2 of Validation Certificate:

Line 21 -- type or print your name and present address.

Form 3780: (Filed only in your name even though you may file joint income tax returns)

Upper right-hand corner -- insert social security or taxpayer identification number.

Name and present address should be typed or printed.

Part 1-B -- insert number of shares (shown on enclosed share certificate) in box after "October 15, 1969" and in following box insert the actual value of purchase which is \$10.00 times the number of shares purchased.

Form 3780 Continued:

Next to last line -- sign return and insert date of signing which should be within the month of January, 1970.

Attach Copy 2 of Validation Certificate.

NOTE: IF YOU HAVE ACQUIRED OTHER FOREIGN STOCK OR DEBT OBLIGATIONS DURING THE FOURTH QUARTER OF 1969, OTHER PORTIONS OF FORM 3780 SHOULD BE COMPLETED, AS APPROPRIATE.

Form 4322-A:

Box 2 -- type or print your name (again only name of stock owner, even if you file joint income tax returns).

Box 3 -- insert Social Security Number or taxpayer identification number.

Box 4 -- insert your present address.

Box 9 -- insert the number of shares (shown on enclosed share certificate).

Box 10 -- insert the number of your share certificate (found in the upper left-hand corner of the certificate).

Box 15A -- insert the purchase price of the stock (number of shares times \$10.00Q per share).

Box 18 -- sign your name.

Box 19 -- insert date of signing.

Attach copy 1 of Validation Certificate to Form 4322-A.

ACTION REQUIRED

Place completed Form 3780 (with copy 2 of Validation Certificate attached) and completed Form 4322-A (with Copy 1 of Validation Certificate attached) in the enclosed envelope.

If the enclosed envelope will reach me no later than noon, Monday, January 26, send envelope with enclosures to me and I will arrange for filing.



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- 3 -

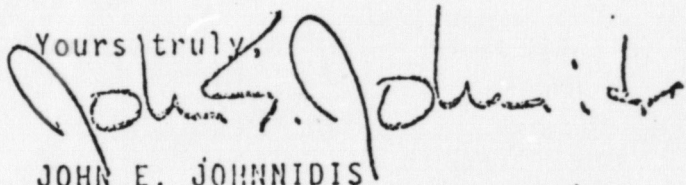
If the enclosed envelope with enclosures will not reach me by January 26, airmail directly to:

Director of International Operations  
Internal Revenue Service  
Washington, D. C. 20225  
U. S. A.

The envelope should be mailed in time to reach that address by January 31, 1970, but will probably be accepted even if late.

This rather complicated procedure is necessary to exempt you from paying additional tax and to provide you with a new Validation Certificate which will give you the option of selling your shares to other U. S. citizens. These new forms will be sent to you directly by the Internal Revenue Service.

Yours truly,



JOHN E. JOHNNIDIS  
Legal Department

NOTE: When Form 4322-A is filed to obtain a new Validation Certificate in your name, it must be accompanied by proof of your U.S. citizenship. Would you, therefore, kindly attach a xerox copy of that page of your Passport which bears your name, address, and vital statistics to Form 4322-A and copy 1 of Form 4322.

FORM 4322-A

(REV. 8-67)

U. S. Treasury Department  
Internal Revenue ServiceAPPLICATION FOR VALIDATION CERTIFICATE  
OF PRIOR AMERICAN OWNERSHIP AND  
INTEREST EQUALIZATION TAX COMPLIANCE

(References are to the Internal Revenue Code)

See Instructions.

1. TRANSFEROR

☒ ACTUAL OWNER☐ NOMINEE

2. NAME (Actual Owner or Nominee)

HOWARD BERSCH

3. SOCIAL SECURITY NO. OR  
EMPLOYER IDENTIFICATION NO.

066-30-8571

4. FULL ADDRESS (Including ZIP Code)

1052 EAST 26 ST BROOKLYN N.Y. 11210

5. IF THE TRANSFEROR IS THE NOMINEE, ENTER NAME OR BROKERAGE ACCOUNT NUMBER OF ACTUAL OWNER

---

6. SOCIAL SECURITY NO. OF  
ACTUAL OWNER

See Box 3

7. THE ACTUAL OWNER IS NOT DEEMED A FOREIGN PERSON UNDER SECTION 4914 OR SECTION 4920 WITH RESPECT TO THE TRANSFER OF THIS STOCK OR DEBT OBLIGATION, AND HE IS NOT AN UNDERWRITER OR DEALER CLAIMING A CREDIT OR REFUND UNDER SECTION 4919 WITH RESPECT TO HIS ACQUISITION OF SUCH STOCK OR DEBT OBLIGATION: and his status is:

☒ U. S. CITIZEN☐ U. S. INDIVIDUAL  
RESIDENT☐ U. S. CORPORATION☐ U. S. PARTNERSHIP☐ U. S. GOVERNMENT  
AGENCY OR  
INSTRUMENTALITY☐ U. S. TRUST☐ U. S. ESTATE

8. STATUS OF NOMINEE

---

☐ U. S. CITIZEN☐ U. S. INDIVIDUAL  
RESIDENT☐ U. S. CORPORATION☐ U. S. PARTNERSHIP☐ U. S. GOVERNMENT  
AGENCY OR  
INSTRUMENTALITY☐ U. S. TRUST☐ U. S. ESTATE9. NUMBER OF SHARES OR  
FACE AMOUNT OF SECURITY

600

10. CERTIFICATE NUMBER(S)

CB20015

11. NAME OF ISSUER OR OBLIGOR

I.O.S., Ltd.

12. CLASS OF STOCK OR  
DESCRIPTION OF SECURITY

Common

13. FIRM NAME AND ADDRESS OF BROKER WHO EXECUTED PURCHASE ORDER  
FOR TRANSFEROR

---

14. NAME AND ADDRESS OF REGISTERED OWNER

See Box 2

15A. TOTAL PURCHASE PRICE  
OF SECURITIES

\$6000.00

15B. PURCHASE DATE

Oct. 15, 1969

16. SETTLEMENT DATE

Oct. 15, 1969

17. MARKET WHERE PURCHASED

Private

I declare under the penalties of perjury that the above information has been examined by me and that to the best of my knowledge and belief, it is true, correct, and complete.

18. SIGNATURE OF OWNER OR NOMINEE (If Corporation, Partnership, Trust, or Estate, give title)

Howard Bersch

19. DATE

1/28/70

## INSTRUCTIONS

Note: The term "foreign securities" as used here means stock, bonds or other obligations of foreign issuers or obligors or depositary receipts or other evidence of interest in such stock or obligations, or rights to acquire such interests.

## PURPOSE

The Interest Equalization Tax Act imposes a tax on purchases and certain other acquisitions of foreign securities by United States citizens, individual residents, and other United States persons, including tax exempt organizations.

The tax, which became effective July 19, 1963, does not apply to the purchase or other acquisition of foreign securities from United States citizens, individual residents or other persons who had such a domestic status, either during the entire period of their ownership or continuously since July 18, 1963. However, such person also must not be ineligible to dispose of such securities as a United States person under sections 4914 or 4920 of the Act.

This application is designed to provide information needed to determine whether the purchase or other acquisition of the foreign securities qualifies for exemption from the tax. If the acquisition described in the application qualifies for exemption

from the tax a validation certificate will be issued by your District Director of Internal Revenue.

## WHO MAY SUBMIT APPLICATION

This form MAY NOT be executed by anyone other than a United States person (as defined in Section 4920(a)(4) of the Internal Revenue Code) who is the actual owner or is a registered nominee, member or member firm of a national securities exchange registered with the Securities and Exchange Commission or a member or member firm of the National Association of Securities Dealers acting for an owner of foreign securities who was a United States citizen, individual resident, or other United States person throughout the period of his ownership or continuously since July 18, 1963.

Where the security being transferred is owned jointly by more than one person, each owner must submit a separate application with respect to his share.

If one co-owner is not a United States person, only the United States person or persons may execute this application for a validation certificate for that portion of the consideration paid by such co-owner.



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Form 3760  
(Rev. May 1959)  
Department of the Treasury  
Internal Revenue Service

## Interest Equalization Quarterly Tax Return

Use only if you are a resident of  
the United States or  
possess a U.S. passport

065-30-8571

Name HOWARD BERSCHQuarter ending  
Dec. 31, 1969

For Internal Revenue use

Address (number and street)

1052 EAST 26 STREET

City or town, State, and ZIP code

BROOKLYN N.Y. 11210 U.S.A.

T. \$ \_\_\_\_\_  
P. \_\_\_\_\_  
D. \_\_\_\_\_  
L. \_\_\_\_\_  
Total \$ \_\_\_\_\_

## PART I.—A. Taxable Acquisitions of Stock of a Foreign Issuer by a U.S. Person

Name of foreign issuer and description of stock	Date acquired	Number of shares purchased	Total actual value	Tax rate (see instructions)	Amount of tax (see instructions)
1. ....					
2. ....					
3. ....					
4. ....					
5. ....					
6. ....					
7. ....					
8. ....					
9. ....					
10. Tax on above acquisitions (add lines 1 through 9) .....					
11. Tax on acquisitions reported on attached Forms 3760-A .....					
12. Total tax (add lines 10 and 11) .....					

## B. Nontaxable Acquisitions of Stock From Another U.S. Person (see instructions under "Who Must File")

I.O.S., Ltd. (Common Stock)	Oct. 15, 1969	600	\$6,000.00		
-----------------------------	---------------	-----	------------	--	--

## PART II.—A. Taxable Acquisitions of Debt Obligations of a Foreign Obligor by a U.S. Person

Name of foreign obligor and description of debt obligation	Date acquired	Period remaining to maturity	Total actual value	Tax rate (see schedule on reverse)	Amount of tax (see instructions)
1. ....					
2. ....					
3. ....					
4. ....					
5. ....					
6. ....					
7. ....					
8. ....					
9. ....					
10. Tax on above acquisitions (add lines 1 through 9) .....					
11. Tax on acquisitions reported on attached Forms 3760-A .....					
12. Total tax (add lines 10 and 11) .....					

## B. Nontaxable Acquisitions of Debt Obligations From Another U.S. Person (see instructions under "Who Must File")

--	--	--	--	--	--

If you are entitled to a special limitation on the amount of tax with respect to any taxable acquisition reported above, (see instructions under "Amount and Rate of tax" and "Special Rules"), insert the actual tax due in the last column and attach a schedule showing how you computed that amount and the grounds on which you claim the limitation (e.g., exercise of a subscription right or conversion of a debt obligation).

1. Enter the total of line 12, Part I, and line 12, Part II. ....
2. Credits (see instructions)—
- (a) For sales by underwriters and dealers to foreign persons. ....
- (b) Other .....
3. If credits (line 2) are less than tax (line 1) enter balance of tax due. Pay in full with this return—> .....

Refund of any overpayment for which credit is not taken on this return may be claimed on Form 243 (see instructions).

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. I understand that this declaration is based on all information of which I have any knowledge.

Sign

here

Howard Bersch  
Taxpayer's signature

1/23/70  
Date

Signature of preparer other than taxpayer

Address

Date

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FORM 4322  
REV. JAN. 1961U. S. Treasury Department  
Internal Revenue ServiceVALIDATION CERTIFICATE OF PRIOR  
AMERICAN OWNERSHIP AND  
INTEREST EQUALIZATION TAX COMPLIANCE

(References are to the Internal Revenue Code)

149515

See instructions  
on Reverse.

1. TRANSFEROR

2. NAME (Actual Owner or Nominee)

3. SOCIAL SECURITY NO. OR  
EMPLOYER IDENTIFICATION NO.☒ ACTUAL OWNER

Bernard Cornfeld

000-20-0916

☐ NOMINEE

4. FULL ADDRESS (Including ZIP Code)

210 Route de Hagnau, Geneva, Switzerland

5. IF THE TRANSFEROR IS THE NOMINEE, ENTER NAME OR BROKERAGE ACCOUNT NUMBER OF ACTUAL OWNER

6. SOCIAL SECURITY NO. OF  
ACTUAL OWNER

7. THE ACTUAL OWNER IS NOT DEEMED A FOREIGN PERSON UNDER SECTION 911 WITH RESPECT TO THE TRANSFER OF THIS STOCK OR DEBT OBLIGATION, AND HE IS NOT AN UPHOLDER OR CLAIMER OF A CREDIT OR REFUND UNDER SECTION 4915 WITH RESPECT TO HIS ACQUISITION OF SUCH STOCK OR DEBT OBLIGATION; and his status is:

☒ U. S. CITIZEN☐ U. S. INDIVIDUAL  
RESIDENT☐ U. S. CORPORATION☐ U. S. PARTNERSHIP☐ U. S. GOVERNMENT  
AGENCY OR  
INSTRUMENTALITY☐ U. S. TRUST☐ U. S. ESTATE

8. STATUS OF NOMINEE

☐ U. S. CITIZEN☐ U. S. INDIVIDUAL  
RESIDENT☐ U. S. CORPORATION☐ U. S. PARTNERSHIP☐ U. S. GOVERNMENT  
AGENCY OR  
INSTRUMENTALITY☐ U. S. TRUST☐ U. S. ESTATE9. NUMBER OF SHARES OR  
FACE AMOUNT OF SECURITY

100

10. CERTIFICATE NUMBER(S), 11. NAME OF ISSUER OR COLLATOR

0020015

I.O.O., Ltd.

12. CLASS OF STOCK OR  
DESCRIPTION OF SECURITY

Common

13. FIRM NAME AND ADDRESS OF BROKER WHO EXECUTED PURCHASE ORDER  
FOR TRANSFERORPurchased from issuing corporation  
and individuals

14. NAME AND ADDRESS OF REGISTERED OWNER

Bernard Cornfeld

15A. TOTAL PURCHASE PRICE  
OF SECURITIES

Unknown

15B. PURCHASE DATE

Prior to  
July 1963

16. SETTLEMENT DATE

Unknown

17. MARKET WHERE PURCHASED

Private

I declare under the penalties of perjury that the above information has been examined by me and that to the best of my knowledge and belief, it is true, correct, and complete.

18. SIGNATURE OF OWNER OR NOMINEE (If Corporation, Partnership, Trust, or Estate, give title)

John J. Jannidis, attorney-in-fact for Bernard Cornfeld

19. DATE

November 15, 1963

DISTRICT DIRECTOR'S VALIDATION

Based on the above information, this document shall constitute for purposes of section 4918, a validation certificate with respect to the security (securities) described above.

SIGNATURE OF DISTRICT DIRECTOR

Edward J. Jannidis

BY

[Signature]

INTERNAL REVENUE DISTRICT

[Signature]

DATE

11/15/63

20. FIRM NAME AND ADDRESS OF BROKER ACTING AS AGENT

21. NAME AND ADDRESS OF NEW OWNER OR NOMINEE

HOWARD BERSCH

1052 EAST 26 STREET BROOKLYN N.Y. 11210 U.S.A.

COPY 2

FORM 4322 (REV. 1-60)



Plaintiff's Notice of Motion for Class Action Determination  
and Supporting Affidavit (Without Exhibits)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
HOWARD BERSCH,

71 Civ. 5373

Plaintiff,

-against-

DREXEL FIRESTONE, INC., et al.,

Defendants.  
-----x

NOTICE OF MOTION FOR  
CLASS ACTION DETERMIN-  
ATION PURSUANT TO RULE  
23(c) OF THE FRCP

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavits of Joan T. Harnes and Jewel H. Bjork, both sworn to the 7th day of April, 1972, the exhibits annexed thereto, and all the pleadings and proceedings heretofore had herein, plaintiff will move this Court at the Courthouse thereof, Foley Square, New York, N. Y. 10007, at Room 506, on May 16, 1972, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, declaring that this action can be maintained as a class suit.

Dated: New York, N. Y.,  
April 7, 1972.

Yours, etc.,

*Silverman & Harnes*  
SILVERMAN & HARNES,  
Attorneys for Plaintiff  
One Rockefeller Plaza  
New York, N. Y. 10020  
765-7884

TO:

DAVIS POLK & WARDWELL, ESQS.,  
Attorneys for Defendants Smith,  
Barney & Co. Incorporated & Banque Rothschild  
One Chase Manhattan Plaza  
New York, N. Y. 10005

BREED ABBOTT & MORGAN, ESQS.,  
Attorneys for Defendant Arthur  
Andersen & Co.  
One Chase Manhattan Plaza  
New York, N. Y. 10005

SULLIVAN & CROMWELL, ESQS.,  
Attorneys for Defendants Drexel Firestone,  
Inc., Pierson, Heldring & Pierson,  
Guinness Mahon & Co., Limited, and  
Hill Samuel & Co., Limited  
48 Wall Street  
New York, N. Y. 10005

WILLKIE FARR & GALLAGHER, ESQS.,  
Attorneys for Defendant J. H.  
Crang & Co., Ltd.  
One Chase Manhattan Plaza  
New York, N. Y. 10005

PAUL WEISS RIFKIND WHARTON & GARRISON, ESQS.,  
Attorneys for Defendant Investors  
Overseas Bank, Ltd.  
345 Park Avenue  
New York, N. Y. 10022



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
HOWARD BERSCH,

71 Civ. 5373

Plaintiff,

:  
AFFIDAVIT

-against-

DREXEL FIRESTONE, INC., et al.,

Defendants.  
-----x

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK )

Joan T. Harnes, being duly sworn, deposes and says:

I am a member of the firm of Silverman & Harnes, attorneys for plaintiff in the above-entitled action, and submit this affidavit in support of plaintiff's motion for class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure.

In September, 1969, plaintiff purchased 600 shares of the common stock of I.O.S., Limited (IOS) pursuant to a public offering of that stock made by IOS and certain of its shareholders. On December 9, 1971, he commenced this action on behalf of himself and all other persons who purchased IOS common stock at the public offering (the Class), alleging that they were defrauded in connection with their purchase. Annexed hereto and marked Exhibit A is a copy of the complaint.

The complaint alleges that 10,992,000 shares of IOS were offered to the public, half directly by the corporation

itself and the remaining half by IOS shareholders. Both offerings were part of an integral whole; they were made upon the same terms and their closings were simultaneous. The public offering was made pursuant to the issuance of three prospectuses which were substantially the same and the IOS common shares issued thereunder were all of the same class of stock. The IOS stock was sold to the public at an aggregate price of \$110 million. Within six months of the public offering, the IOS stock was worthless. It is plaintiff's contention that the stock was also worthless at the time of the public offering and that the principal underwriter who sold this worthless stock to the public for \$110 million knew or should have known this fact.

The complaint alleges that all three prospectuses were false and misleading for the very same reasons. They described IOS, its current business, its subsidiaries and their activities. They portrayed IOS as a highly profitable, rapidly growing and law abiding financial services organization. However, they failed to reveal facts which investors should know before making an investment. Thus the prospectuses omitted to state that:

- (1) IOS engaged in illegal smuggling activities for a substantial part of its income.
- (2) Directors and employees of IOS used, for their own personal purposes, IOS funds and credit.
- (3) IOS books and records were in chaotic condition.



- (4) Directors and officers of IOS charged excessive travel and entertainment charges to IOS and IOS incurred exorbitant administrative expenses.
- (5) Various IOS officers engaged in activities constituting violations of the antifraud provisions of the National Securities Laws.
- (6) IOS made illegal purchases of gold in violation of U.S. law, for which it may be fined in excess of \$62 million.

The complaint alleges that the defendants knew or should have known, through the exercise of due diligence, that the prospectuses were false and misleading but, nevertheless, distributed them through the mails and other means of interstate commerce, and sold the underlying shares to the public for \$110 million.

The prospectuses contained financial reports certified by defendant Andersen, which omitted material facts. Additionally, the financial reports spoke as of the year ended December 31, 1968, approximately nine months prior to the date of the public offering. Since IOS' financial position varied with fluctuations in various financial markets of the world, up-to-date financial statements were essential to a proper evaluation of IOS as an investment. The complaint alleges that Andersen knew or should have known that its certified statements should not have been used in connection with the IOS offering, but, nevertheless permitted their use. Copies of the prospectuses are annexed hereto and marked Exhibits B, C and D.

Since these prospectuses are substantially similar, common questions of fact and law exist as to the class and predominate over questions affecting individual members. Persons who purchased under one prospectus were defrauded in like manner as those who purchased under the other two.

To my knowledge, only one other action involving the IOS public offering has been commenced. That action is pending in Switzerland and is criminal in nature. Jewel H. Bjork, of this office, met in Geneva, Switzerland with the attorney for the complainant in that action and was able to determine: (a) that the principal underwriter and Andersen are not defendants in that action because a Swiss court cannot obtain jurisdiction, nor is their liability under Swiss law; (b) the actions do not conflict; (c) the attorney for divers class members encourages this action and has offered to cooperate with us; and (d) because contingent fees are not permitted in Europe, there is no likelihood of a class action being brought there. The Bjork affidavit is annexed hereto as Exhibit E. Exhibits to the Bjork affidavit are numbered.

It is, therefore, proper that the class action be centered in this Court, since the two lead American underwriters for the offering were the defendants Drexel Firestone, Inc. and Smith, Barney & Co., both of whom have their principal offices in New York. The defendant Arthur Andersen & Company acted as independent public accountant for the offering, and its office is also in New York. The prospectuses were prepared by the New York law firms of Willkie Farr & Gallagher



and Shearman & Sterling and were distributed by the U.S. mails or by other means of interstate commerce, from this forum. The English language version of those prospectuses was deemed controlling. Furthermore, the plaintiff and other members of the class made their purchase of IOS stock in New York.

This Court has jurisdiction, under the Securities Exchange Act, as alleged in the complaint, over the New York registered broker-dealers. The standards imposed by the National Securities Laws upon such broker-dealers applies to their conduct wherever they may engage in the securities business. The foreign underwriters acted as their aiders and abettors and, accordingly, they are also liable.

The defendants have answered the complaint herein and it is appropriate for the class action motion to be determined at the earliest possible time. This motion was made on April 7, returnable May 16, pursuant to agreement among all attorneys that the May 16 date be a firm one. Defendants will be allowed three weeks in which to file answering papers in this motion, and plaintiff will have two weeks to reply thereto. A copy of the stipulation entered into between attorneys for the plaintiff and defendants and the order entered thereon is attached and marked Exhibit F.

Sworn to before me this  
7<sup>th</sup> day of April, 1972.

*Glady R. Fiske*

*Joan T. Harnes*  
Joan T. Harnes

**Affidavit of Bertram D. Coleman in Opposition to  
Motion for Class Action Determination**

55A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x

HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., et al.,

Defendants.

:

:

:

:

:

71 Civ. 5373

AFFIDAVIT IN  
OPPOSITION TO  
MOTION FOR  
CLASS ACTION  
TREATMENT

-----x

COMMONWEALTH OF PENNSYLVANIA )

) ss.:

COUNTY OF PHILADELPHIA )

BERTRAM D. COLEMAN, being duly sworn, says:

I am Chairman of the Executive Committee of Drexel Firestone, Inc., 1500 Walnut Street, Philadelphia, Pennsylvania, one of the defendants in the above matter. I make this affidavit in opposition to plaintiff's motion for an order determining that this action may be maintained as a class action.

Drexel Firestone, a corporation organized under the laws of Delaware, engages in, among other things, underwriting and investment banking activities in the United States and a number of other countries.

In September 1969 Drexel Firestone (then known as Drexel Harriman Ripley Incorporated) led a group of 122 underwriters from fourteen countries, including 26 firms based in the United States, in the underwriting, wholly outside the United States, Canada, and Mexico, of a primary offering of 5,600,000 newly issued Common Shares of I.O.S., Ltd. ("IOS") (the "Primary Offering"). Plaintiff's complaint charges that the Primary Offering, as well as two



simultaneous secondary offerings of already outstanding Common Shares of IOS, violated the Securities Act of 1933, the Securities Exchange Act of 1934, and regulations thereunder. The two secondary offerings of IOS shares were by a group of Canadian underwriters headed by defendant J. H. Crang & Co. Limited (the "Crang Offering") and by defendant Investors Overseas Bank, Limited, a wholly-owned subsidiary of IOS (the "IOB Offering").

At the time of the Primary Offering, IOS was a non-resident company organized under the laws of Canada with its principal executive offices in Geneva, Switzerland. It was the parent company of an international sales and financial service organization principally engaged in the sale and management of mutual funds and complementary financial services, including investment and commercial banking, sales and management of real estate investments and properties, and life insurance. Under the terms of a consent order issued by the United States Securities and Exchange Commission ("SEC") on May 23, 1967, IOS and its affiliates were forbidden to engage in any activity subject to the jurisdiction of the SEC and, with exceptions not here material, were barred from making any

"sales of securities to United States citizens or nationals wherever located, except for . . . offers and sales outside of the United States (and its territories, possessions, or commonwealth subject to the jurisdiction of the United States) to officers, directors and full-time personnel of IOS and its subsidiaries . . . ."  
(Paragraph 4(i).)

Pursuant to these requirements, at the time of the Primary Offering IOS and its affiliates were not engaged in the sale of mutual fund shares or other securities in the

United States or in any other activity subject to the SEC's jurisdiction.

Six representatives of Drexel Firestone and three representatives of Shearman & Sterling, counsel to the underwriters, assisted by representatives of other underwriters, spent most of the months of July, August, and September 1969 in Geneva and Brussels, reviewing and revising the prospectus to be used in the Primary Offering and setting up the underwriting syndicate. With minor exceptions such as the obtaining of the ruling of the Internal Revenue Service mentioned below, all of the work done on the Primary Offering by Drexel Firestone, counsel, and the other underwriters was done outside the United States. The English versions of the preliminary and final prospectuses for the Primary Offering were proofread and printed in London. The French translations were printed in Switzerland and the German translations were printed in West Berlin. The preliminary and final prospectuses were distributed from London and Brussels solely to underwriters and dealers with offices outside the United States, Canada, and Mexico. No prospectuses for the Primary Offering were sent to any address in the United States, Canada, or Mexico.

Since the Primary Offering was to be made principally in Europe and Japan and wholly outside the United States, Canada, and Mexico, the syndication of the underwriting was accomplished exclusively in Europe. 96 of the 122 underwriters were firms located outside the United States, with the greatest number being located in the United Kingdom, France, Germany, the Netherlands, Luxembourg, and Norway. No United States firm was permitted to serve as an



underwriter unless it had an office outside the United States, Canada, and Mexico from which it could conduct all its activities connected with the Primary Offering. Only two of the six Representatives of the Underwriters -- Drexel Firestone and Smith, Barney & Co. Incorporated -- were United States firms; Drexel Firestone conducted all its solicitation and selling activities in the Primary Offering through its offices in Brussels and Paris and, on information and belief, Smith, Barney did likewise. The other four Representatives were European firms -- Hill Samuel & Co. Limited and Guinness Mahon & Co. Limited in the United Kingdom, Banque Rothschild in France, and Pierson, Heldring & Pierson in the Netherlands. The Underwriting Agreement between IOS and the underwriters was concluded in London. The Agreement Among Underwriters was concluded in Brussels. The closing of the Primary Offering also took place in London.

The safeguards adopted in the Primary Offering to preclude any possibility of sales of IOS Common Shares to a citizen or resident of the United States were, to the best of my knowledge, the most stringent ever taken in any European securities offering. Both the Agreement Among Underwriters and the Selling Agreement signed by all Selected Dealers contained an italicized provision prohibiting sales in the United States, Canada, or Mexico or to citizens or residents of the United States. At the closing of the Primary Offering, before any IOS Common Shares were delivered to a given underwriter, that underwriter was required to furnish certificates from himself and all Selected Dealers and other securities dealers to whom he sold IOS Common Shares, in the form annexed

as Exhibit A hereto, attesting that these restrictions had been complied with. These restrictions were brought directly to the notice of each recipient of the prospectus used in the Primary Offering by the following legend, which appeared just below the underwriting spread on the first (cover) page of the prospectus:

"The Common Shares offered by this prospectus are not registered under the United States Securities Act of 1933 and are not being offered in the United States of America or any of its territories or possessions or any areas subject to its jurisdiction (the 'United States') or in Canada or Mexico; or to nationals or citizens of or persons resident or normally resident in the United States or to certain other persons and organizations described under 'Underwriting'. In addition, such Common Shares are not being offered in this offering to directors, officers, full-time employees or sales personnel of I.O.S., Ltd., its subsidiaries or affiliates or their immediate families."

To the best of my knowledge, these restrictions were fully complied with by every underwriter, Selected Dealer, and securities dealer who took part in the Primary Offering.

Specifically, I know of no instance in which IOS Common Shares were sold in the Primary Offering in the United States or to any citizen or resident of the United States.

A further deterrent to any distribution of the IOS Common Shares sold in the Primary Offering to any United States person was a ruling obtained by the underwriters from the United States Internal Revenue Service that any acquisition of these shares by a United States person would be subject to the United States Interest Equalization Tax. This opinion was explicitly disclosed in the prospectus used in the Primary Offering (p. 38).



The IOS Common Shares were not listed on any American stock exchange. A review of the National Quotation Bureau quotation sheets (the "pink sheets") confirms that there has never been an over-the-counter market for IOS Common Shares in the United States. No tombstone advertisement or other announcement of the Primary Offering was published in any newspaper or other periodical in the United States.

None of the Representatives of the Underwriters or any of the 122 underwriters in the Primary Offering had any participation in the Crang and IOB Offerings, and the Representatives of the Underwriters were told by officers of IOS that the underwriting group in the Crang Offering had agreed that the IOS Common Shares sold in that Offering would not be sold to citizens or residents of the United States. They were also told that no IOS Common Shares would be sold in the IOB Offering (1) in the United States, or (2) to any United States citizens or residents outside the United States except full-time employees of IOS and its affiliates.

/s/ Bertram D. Coleman

BERTRAM D. COLEMAN

Sworn to before me this  
day of April 1972.

---

# 61 A

THIS CERTIFICATE MUST BE COMPLETED AND RETURNED  
PRIOR TO THE CLOSING DATE BEFORE ANY SHARES CAN BE  
DELIVERED TO YOU

*Underwriters and Selected Dealers* must complete Part A and return the Certificate to The Bank of New York, 147, Leadenhall Street, London, E.C.3, England, together with the Certificates, if any, of other Underwriters, Selected Dealers or other securities dealers to whom they sold Shares referred to in Part A.

*Underwriters and Selected Dealers* who have purchased Shares from Underwriters or Selected Dealers other than Drexel Harriman Ripley, Incorporated must complete Part B (on a separate form of Certificate) and return to the Underwriter or Selected Dealer from whom such Shares were purchased.

*Other Securities Dealers* must complete Part C and return to the Underwriter or Selected Dealer from whom Shares were purchased.

## CERTIFICATE

DREXEL HARRIMAN RIPLEY, INCORPORATED  
BANQUE ROTHSCHILD  
GUINNESS MAHON & CO. LIMITED  
HILL SAMUEL & CO. LIMITED  
PIERSON, HELDRING & PIERSON  
SMITH, BARNEY & CO. INCORPORATED  
As Representatives of the several Underwriters  
c/o DREXEL HARRIMAN RIPLEY, INCORPORATED  
386, Avenue Louise  
Brussels 5, Belgium

Dear Sirs:

In connection with our purchase of Common Shares of I.O.S., Ltd. ("Shares") we hereby furnish information and certify and agree as follows:

### Part A

*(To be completed by Underwriters and Selected Dealers with respect to Shares purchased pursuant to the Underwriting Agreement.)*

- (1) Number of Shares purchased through Drexel Harriman Ripley, Incorporated . . . . .
- (2a) Number of such Shares sold to retail purchasers (including individuals, institutions, advisory accounts and own investment accounts) . . . . .
- (2b) Number of such retail purchasers . . . . .
- (3a) Number of such Shares sold to Underwriters, Selected Dealers and other recognized securities dealers . . . . .
- (3b) Number of such Underwriters, Selected Dealers and recognized securities dealers . . . . .
- (4) Number of such Shares remaining unsold . . . . .

### Part B

*(To be completed by Underwriters and Selected Dealers with respect to Shares purchased otherwise than pursuant to the Underwriting Agreement.)*

- (1) Number of Shares so purchased . . . . .
- (2a) Number of such Shares sold to retail purchasers (including individuals, institutions, advisory accounts and own investment accounts) . . . . .
- (2b) Number of such retail purchasers . . . . .
- (3) Number of such Shares remaining unsold . . . . .



## Part C

(To be completed by other securities dealers.)

- (1) Number of Shares purchased . . . . . \_\_\_\_\_
- (2a) Number of such Shares sold to retail purchasers (including individuals, institutions, advisory accounts and own investment accounts) . . . . . \_\_\_\_\_
- (2b) Number of such retail purchasers . . . . . \_\_\_\_\_
- (3) Number of such Shares remaining unsold . . . . . \_\_\_\_\_

Such Shares were sold at the offering price and were sold only to retail purchasers. The undersigned agrees not to sell any unsold Shares except to retail purchasers.

We have maintained and will maintain written records of the name, nationality and country of residence of each individual person to whom we have sold Shares, the name, address, country of incorporation and country of domicile of each corporation to which we have sold Shares and other relevant information with respect to partnerships and associations necessary as a basis for the certifications made below. We agree to deliver to you additional certificates in this form with respect to any Shares which we have reported as unsold in this Part C.

We further agree to pay to you on demand an amount equal to the reallocation concession in effect in the underwriting managed by you, if any of the Shares purchased by us were sold by us contrary to our certification below.

We have used and will use our best efforts to obtain a broad distribution of the Shares among *bona fide* investors, and in accordance therewith, not to sell more than 1,000 Shares to any person other than an institutional investor or more than 10,000 Shares to any one institutional investor.

We have not and agree not to offer, sell or deliver any Shares to any person who is a director, officer, full-time employee or member of the sales organization (or a member of such person's immediate family) of I.O.S., Ltd. or any of its subsidiaries or affiliates.

(The following certification is made by each Underwriter, Selected Dealer or other securities dealer who has completed Part A, B or C above.)

The undersigned certifies that it has not directly or indirectly offered, sold or delivered any of the Shares sold by it to retail purchasers:

1. in the United States of America or any of its territories or possessions or any areas subject to its jurisdiction (the "U.S.");
2. in Canada or Mexico for a period of six months after the date of the Agreement Among Underwriters and the Selling Agreement except for deliveries in Canada solely for the purpose of registration of Shares;
3. to nationals or citizens of or persons resident or normally resident in the U.S. ("U.S. persons");
4. to partnerships or associations any of whose partners or members are U.S. persons ("U.S. partnerships or associations"); or
5. to corporations incorporated in, domiciled in or having their principal place of business in the U.S. or which are controlled by such corporations, U.S. partnerships or associations.

.....  
(Name of Underwriter or Dealer)

By: .....  
(Authorized Signature(s))

.....  
(Address)

Date

1969

Affidavit of Murray J. Howe in Opposition to  
Motion for Class Action Determination

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL  
HARRIMAN RIPLEY, BANQUE ROTHSCHILD  
HILL SAMUEL & CO., LIMITED,  
GUINNESS MAHON & CO., LIMITED,  
PIERSON, HELDRING & PIERSON,  
SMITH, BARNEY & CO. INCORPORATED,  
J. H. CRANG & CO., INVESTORS  
OVERSEAS BANK LIMITED, ARTHUR  
ANDERSEN & CO., I.O.S., LTD., and  
BERNARD CORNFELD,

Defendants.

Index No.  
71 Civ. 5373

AFFIDAVIT

-----X  
DOMINION OF CANADA     )  
                              : ss.:  
PROVINCE OF ONTARIO    )

MURRAY J. HOWE, being duly sworn, deposes and says:

1. I am the President of J. H. Crang & Company, Ltd. I make this affidavit in opposition to the plaintiff's motion to have this action established as a class action at this time on the ground that the subject matter jurisdiction of this Court is seriously in doubt. The Complaint herein is based on three underwritings of shares issued by I.O.S. Ltd., including an underwriting in Canada in which Crang was the banking group manager. I, as a partner in J. H. Crang & Co. was in charge of and personally handled the Canadian underwriting and, accordingly, make this affidavit on knowledge.

2. J. H. Crang & Company, Ltd. is a corporation organized and existing pursuant to the laws of the Province of Ontario and is the successor in interest to J. H. Crang & Co. ("Crang"), a partnership. J. H. Crang & Company, Ltd. is registered with the Ontario Securities Commission as a



017                      0-4

broker-dealer and it has offices only in Canada. It is a member of all Canadian stock exchanges and is not a member of any United States stock exchange or affiliated with any member of a United States stock exchange. J. H. Crang & Company, Ltd. does not offer or sell any securities in the United States and does not solicit offers to buy or sell securities in the United States. It does not transact a business in securities in the United States.

3. From time to time J. H. Crang & Company, Ltd. requests Canadian affiliates or subsidiaries of United States brokerage houses to execute through United States exchanges certain transactions in securities on behalf of its customers. These transactions are merely an accommodation for its customers. They are an insignificant amount of its business and are not for its own account.

4. On September 24, 1969, the Canadian banking group, including Crang, issued a prospectus concerning the sale of 1,450,000 Common Shares of I.O.S., Ltd. ("IOS") on the form annexed hereto as Exhibit A. On or about April, 1969, I was informed by Edward M. Cowett ("Cowett"), then the chief operating officer of IOS, that IOS contemplated a public offering and that certain IOS shareholders would sell a portion of their shares separately but at the same time. That conversation, I believe occurred at a meeting in Geneva, Switzerland, between Cowett and myself, but may have been by telephone between Cowett in Geneva and myself in Toronto. Cowett asked me if Crang would underwrite a portion of the shares of the selling shareholders to be sold only in Canada.

Commission, Crang was and is permitted to sell any shares of an issuance cleared by the Ontario Securities Commission to any permanent resident of Ontario. Crang always understood that if the issue was not registered in the United States, it was prohibited from making sales to those having their principal residence in the United States. Cowett indicated to me that, in addition to United States residents, shares were not to be sold to United States citizens since IOS shares were not listed on an American exchange and IOS was prohibited by a settlement agreement entered into with the United States Securities and Exchange Commission on May 23, 1967 from selling in the United States shares of funds that it managed through subsidiaries. (A copy of the documents comprising the settlement agreement are annexed hereto as Exhibit B.) Crang agreed to form a Canadian banking group and agreed to offer the shares only in Canada. Crang also agreed to permit certain members of the banking group that it would form to place certain designated amounts of the IOS shares with non-American clients of their branch offices in the United Kingdom and also agreed to permit a banking group member to sell shares in the Bahamas to non-Americans.

5. The discussion with Cowett culminated in an underwriting agreement between Cowett, on behalf of himself and other selling shareholders, and Crang dated September 23, 1969, a copy of which is annexed hereto as Exhibit C (the "underwriting agreement"). Paragraph 4(d) of the underwriting agreement expressly provides that Crang will use its best efforts not to sell shares to United States citizens or residents. To implement that provision, in addition to the restrictions of its license allowing sales



to persons having their principal residence in Ontario, Crang agreed to attempt to prohibit sales to American Citizens, wherever their residence. Throughout the late spring, summer and fall of 1969, Crang received many inquiries and orders, mostly by telephone, from Americans and other non-Canadians as to whether they could purchase IOS shares in the Crang underwriting. In each instance, Crang replied that it would not sell IOS shares to Americans or to other non-Canadians. (Examples of that correspondence are annexed hereto as Exhibit D.)

6. The underwriting agreement embraced 1,300,000 shares of IOS stock. In conjunction with that underwriting agreement Crang entered into a sub-underwriting agreement with I.O.S., Ltd. and Investors Overseas Bank Limited ("IOB"), whereby Crang would purchase from IOB 150,000 shares (the "sub-underwriting agreement"). Paragraph 4 of the sub-underwriting agreement provided that Crang would sell those 150,000 shares to Canadian executives and sales personnel of IOS and its subsidiaries, Canadian investors in mutual funds managed by IOS and long-term Canadian clients of IOS as designated by IOS. A copy of the sub-underwriting agreement is annexed hereto as Exhibit E.

7. In furtherance of its obligations under paragraph 4(d) of the underwriting agreement, Crang entered into two separate banking group agreements with several Canadian investment houses, none of whom was owned by a United States brokerage or investment firm, in the form annexed hereto as Exhibits F1 and F2 (the "banking group agreement"). Exhibit F1 is the form of banking group agreement entered into with those Canadian firms having branch offices in the United

Kingdom and permitted them to place a designated amount with their clients in the United Kingdom. Exhibit F<sub>2</sub> is the form of banking group agreement entered into with those members of the banking group not having such branch offices and whose distribution, therefore, was to be limited to Canada.

Paragraph 2(c) of each agreement provides that the banking group members would not knowingly, directly or indirectly, sell shares to United States citizens or to employees of IOS or its affiliated companies. This undertaking was the first of its kind in any Canadian underwriting with which I am familiar. It was entirely new to the banking group members. I visited various banking group members several times during the summer of 1969 to explain the reason for our insistence upon that provision; that reason was: to insure that shares of IOS were not sold to Americans.

8. Furthermore, to insure compliance with paragraph 2(c) of the banking group agreements, Crang required each member of the banking group to warrant, in the forms annexed hereto as Exhibit G, that it had no knowledge that it sold any shares to American citizens or residents. After the underwriting was completed, each member of the banking group executed and returned their respective form to Crang.

9. To insure that Crang sold no shares to any American citizens, each employee of Crang was instructed by a memorandum, a copy of which is annexed hereto as Exhibit H, that sales were restricted to Canada, and that, under no conditions, were sales to American citizens to be made.

10. The text of the prospectus was prepared in



Toronto and Geneva, principally by Crang's counsel, the firm of Zimmerman & Winters of Toronto. The financial statements were prepared by IOS and its auditors, Arthur Andersen & Co. Upon information and belief, those statements were prepared in Geneva, pursuant to an audit in Geneva; they are dated from Geneva. At no time during the period from May 1, 1969 to October 15, 1969, when the underwriting was completed, did I or anyone at Crang discuss provisions of the prospectus with anyone in the United States by telephone. During that period, no Crang partner or employee met anyone in the United States to discuss the prospectus. Specifically, no one at Crang telephoned or met with any member or associate at Shearman & Sterling or Willkie Farr & Gallagher concerning the prospectus during that period. Contrary to the allegation of paragraph 2(g) of the Complaint, those firms took no part in preparing the prospectus offering the stock underwritten by Crang. Similarly, not until after October 1, 1969, did I or any one at Crang discuss the prospectus offering the shares underwritten by the group headed by Drexel Harriman & Ripley (the "Drexel prospectus") or the IOB prospectus. A simple reading of the text of the Drexel prospectus, in comparison with the text of the Crang prospectus, proves the dissimilarity of the two. Unlike the Drexel and IOB prospectus, the Crang prospectus was drafted to conform to and satisfy the requisites of Canadian securities laws and regulations.

11. Each step of investigation of IOS by Crang and its counsel, and each negotiation was conducted outside the United States and primarily in Geneva and Toronto. There was never any meeting arranged in the United States

to discuss the prospectus or the Crang underwriting agreement. Neither Crang nor its counsel performed in the United States any act relating to the preparation of the Crang prospectus or the sale of the securities thereunder.

12. This offering was conducted under the regulation of each provincial Securities Commission in Canada. Each of them reviewed the prospectus in its initial and final forms and each of them cleared the underwriting after review of the prospectus. (Copies of the documents clearing the issuance are annexed hereto as Exhibit I.) In fact, I was informed by counsel that the language on the first page referring to the contemporaneous offering by Drexel and IOB was inserted at the insistence of one of those securities commissions.

13. After the shares were issued to the various banking group members, Crang received from each of them a completed copy of their respective form annexed hereto as Exhibit G by which each warranted that it had no knowledge of sales to United States citizens or residents.

14. Crang itself took extraordinary measures, once the offering became effective, to insure that no sales were made to United States citizens or residents. In addition to rejecting any offers from the United States prior to the underwriting, Crang prepared for and sent to its sales personnel a memorandum for use with the prospectus in the form annexed hereto as Exhibit J. As can be seen from that memorandum Crang's sales personnel were told that the official policy of the Company was not to make such sales. In addition, Crang's

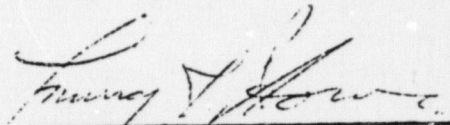


sales manager, Mr. Jack Leishman, and I set up a special screening process to assure compliance with paragraph 4(d) of the underwriting agreement. We personally checked every order received through our sales system and compared the physical confirmations that would go to the clients against the order before they were mailed out each night in order to assure that no sales were made to persons giving a United States address. Furthermore, our accounts department was instructed that under no circumstances were the clients to change delivery instructions to any address that did not appear upon the original confirmation. To my recollection, there was never a day during that whole period that these special instructions were not stressed to someone in our organization and, in fact, to anyone who phoned us with an unsolicited order.

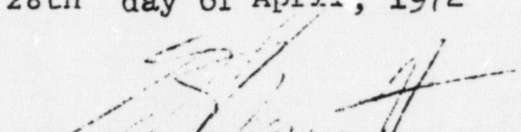
15. Moreover, Crang did not mail prospectuses offering the IOS securities for sale to anyone in the United States. From time to time, at the request of certain people in the security business in the United States, Crang mailed a copy of the final prospectus to such individuals; each copy was stamped "for information only" on the front page. After the final prospectus was cleared, Crang, as an accommodation, sent prospectuses to IOS and to Cowett in Geneva. As the front page of the prospectus stated that shares offered pursuant to that prospectus were offered for sale in Canada, it was clear that the prospectus was not to be used as a selling document elsewhere. I am informed that plaintiff alleges that he read the Crang prospectus before purchasing shares from IOB. Crang neither sent nor gave him a prospectus. I have no knowledge how plaintiff acquired a

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copy of the prospectus, if indeed he did. Crang did not sell any shares to plaintiff, and the plaintiff does not allege in his complaint that he purchased from anyone but IOB. Every effort was made to keep the shares underwritten by Crang out of the hands of the United States citizens and residents and, to the best of my knowledge, that goal was accomplished.

  
Murray J. Howe

Sworn to before me this  
28th day of April, 1972

  
A Notary Public in and  
for the Province of Ontario



71A-1

Affidavit of Morris Mendelson in Support of  
Motion for Class Action Determination

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

HOWARD BERSCH,

71 Civ. 5373

Plaintiff,

AFFIDAVIT

-at st-

DREXEL FIRESTONE, INC., et al.,

Defendants.

-----X

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK )

Morris Mendelson, being duly sworn, deposes and says:

I am an Associate Professor of Finance at the Wharton School of the University of Pennsylvania. I have been a student of finance for more than 20 years, and have written extensively on capital markets. I am co-author of a book entitled "Investment Banking and the New Issues Market," which resulted from a study financed by the Investment Bankers Association. I have also written on the Eurobond market. My most recent publication on that subject, "The Eurobond and Capital Market Integration," appears in the Journal of Finance, March, 1972.

I have been retained by plaintiff to make a study of the IOS public offering which took place on September 24, 1969 (Public Offering) for the purpose of determining whether the Public Offering had an effect upon the U. S. securities markets and American investors. As a result of my

investigation, I conclude that the Public Offering had an adverse effect upon our securities markets and investors. The facts and circumstances supporting my conclusion follow:

PRINCIPLES INVOLVED IN IOS PUBLIC OFFERING

Drexel, Harriman, Ripley, Inc. (Drexel), an American broker-dealer, registered with the Securities and Exchange Commission (SEC), was the lead underwriter of the Public Offering. Its principal executive and operating officers were United States citizens. One of the officers of Drexel known personally by me was Christian Sonne. Mr. Sonne was concerned with international offerings. Mr. Sonne's office was located in New York City.

Arthur Andersen & Co. (Andersen), an American accounting firm, prepared the financial statements used in the Public Offering. The New York law firms of Willkie Farr & Gallagher and Shearman & Sterling participated in the preparation of the prospectuses. The aggregate value of the securities sold in the Public Offering was \$110 million.

The aftermath of the Public Offering was a debacle of monumental proportions which resulted in a deterioration of investor confidence in American underwriters at home and, particularly, abroad. It occurred at a time when our economy was in the throes of tightening capital markets. Many United States corporations needing funds for expansion looked for European sources of funds. The adverse publicity



### 71A-3

attendant upon the subsequent failure of the IOS stock so offered was one factor which increased the difficulty of United States corporations seeking to raise capital abroad.

In order to maintain a healthy securities market, it is important that investors have trust and confidence in the information they receive and the parties associated with its dissemination. To the extent the investors' confidence and trust is impaired, investors retreat from that market and seek alternative investment media. Withdrawal of funds from a securities market inevitably depresses the market.

The false and misleading prospectus issued in connection with the Public Offering impaired investors' confidence and trust and contributed to a steep decline in the purchases of United States securities by foreigners. In 1969, there were net purchases of United States stocks by foreigners of \$1,487,000,000. In the subsequent period from January 1970 through May 1970, when the impact of the IOS Public Offering was greatest, there was a net disinvestment by foreigners in American stocks of \$290,000,000. (Source: Federal Reserve Bulletin.) This substantial swing of funds from our market contributed to the depression of stock prices that was being experienced in the American market at the time. Both the U. S. balance of payments and American investors holding United States securities were adversely affected. American companies with access to the international market had to pay more for their money as securities prices declined and confidence in the dollar waned.

71A-4

IOS' principal business activity at the time of the Public Offering was the sale and management of mutual funds. Among the funds sold and managed by IOS was Fund of Funds, Limited. Subsequent failure of this Public Offering caused loss of investor confidence in IOS as a competent manager of money. Many investors owning shares of Fund of Funds redeemed their holdings. At the time of the Public Offering, Fund of Funds had net assets of approximately \$675,000,000. More than two-thirds of Fund of Funds' assets were invested in United States securities. I have been advised by Sidney B. Silverman, Esq., attorney for the plaintiff, that Fund of Funds' present net asset value is \$110,000,000.

When a shareholder redeems his securities, he is paid the then net asset value of the fund's shares in cash. In order to have the cash to meet anticipated redemptions, a fund replenishes cash by liquidating part of its portfolio. The decline in Fund of Funds' net assets resulted in large part from redemptions. Fund of Funds must have sold a substantial part of its portfolio to raise the cash necessary to pay its redeeming shareholders. Wholesale sales of Fund of Funds' portfolio securities, consisting mainly of United States securities, would have a triple impact upon the American securities market. First, the sale of large blocks of stock, even in a turn-around situation (where the seller reinvests the proceeds in other United States securities) would have a depressing effect on the price of the stock



sold. Second, the net withdrawal of funds from the U. S. market as a whole also had an adverse effect on American market prices in general. Third, it is likely that in numerous instances, specific securities in Fund of Funds' portfolio had to be disposed of under forced sale circumstances which would disrupt orderly markets.

One of the reasons for foreigners' enthusiasm for American securities revolves around the superior disclosures made in U. S. documents issued in connection with various types of offerings. The widespread use of a false and misleading prospectus in connection with the Public Offering must have impaired the usefulness of other U. S. documents used for American offerings to foreign investors. Although IOS was a Canadian corporation with its principal place of business in Geneva, it was owned and managed by Americans and engaged principally in the activity of selling and managing mutual funds which, in turn, invested in United States securities. IOS is identified as an American company in the minds of investors. The underwriters, led by an American firm and assisted by American accountants, enhanced the image in the public mind that this offering was an American type offering. American attorneys participated in the preparation of the prospectus. The subsequent failure of the Public Offering of an American type company, led by an American team, reflected poorly upon the financial services of this country and served to undermine investor confidence in America and abroad in United States securities.

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The Public Offering was a firm offering in which the underwriters purchased the securities offered by IOS. To the extent that Drexel and the other 25 American banking firms participating in the underwriting committed their capital to purchase the IOS stock, this capital could not be used in other business activities including the underwriting of United States securities. The size of this offering and the commitment made by the United States banking firms participating therein was significant and constituted a limiting factor upon the ability of these firms to engage in other underwriting activities.

The subsequent failure of the IOS underwriting contributed to a breakdown in the entire structure of building up an offshore investing industry whereby funds of European investors were channeled into American securities markets. I agree with the observation of Fred H. Klopstock, Manager of the International Research Department of the Federal Reserve Bank of New York, that "the important role of offshore mutual funds . . . may well have been affected by the recent IOS events" (June 1970).



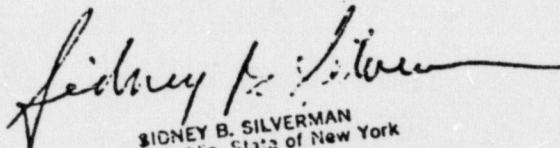
71A-7

One of the principal functions of a lead underwriter is syndicating an issue. Drexel is headquartered in the U.S. and there is no question in my mind that a considerable portion, if not the bulk, of the syndicating function must have been performed by Drexel in the U. S., probably in New York City.

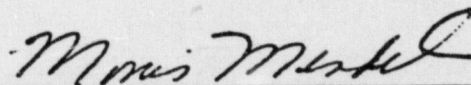
Furthermore, the various activities of Drexel as a lead underwriter, including studies, and reaching decisions leading to judgments about whether to participate in the underwriting or not, as well as how to structure the underwriting, had to have been undertaken by various top level officials of Drexel who were principally located in New York and Philadelphia.

Sworn to before me this

9th day of May, 1972.



SIDNEY B. SILVERMAN  
Notary Public, State of New York  
No. 31-3571030  
Qualified in New York County  
Commission Expires March 30, 1975



Morris Mendelson

Affidavit of Howard Bersch in Support of Motion for  
Class Action Determination (Without Exhibits)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
HOWARD BERSCH, :  
 :  
 Plaintiff, : 71 Civ. 5373  
 :  
 -against- : AFFIDAVIT  
 :  
 DREXEL FIRESTONE, INC., et al., :  
 :  
 Defendants. :  
-----x

STATE OF NEW YORK )  
 : ss.:  
COUNTY OF NEW YORK )

Howard Bersch, being duly sworn, deposes and says:

I am the plaintiff in the above action and submit this affidavit in support of the motion for class action determination. I am a United States citizen by birth and have always resided in New York. I purchased 600 shares of I.O.S., Ltd. (IOS) stock at the public offering for an aggregate purchase price of \$6,000. My purchase was made in New York and the confirmation thereof was mailed to me in New York. I paid for the IOS stock with a check drawn on a New York bank and mailed by me to Geneva, Switzerland. I received a printed form letter from IOS, dated January 15, 1970, advising me of certain tax consequences of my purchase. A stock certificate evidencing my purchase was mailed to me in New York. Annexed hereto are copies of the confirmation, printed form letter and stock certificate.



At the time of my purchase, I was employed by Saja Associates, Ltd., (Saja) a privately-owned company located at 444 Madison Avenue, New York, New York. Saja acted as a consultant to IOS. At our offices in New York were copies of the three prospectuses used in this offering. One was mailed to my home in New York. I read all three prospectuses.

I was not the only American residing here who purchased IOS stock. The offering was made to persons who were employed by Saja and Ampersand & Company, Inc., a privately-owned company and consultant to IOS. As well, the offering was made to the employees of the seven companies owned by IOS Communications, Ltd. a subsidiary of IOS. Among the New Yorkers purchasing the IOS securities were: Christine Cullen, Nadyne Nelson, Claire Pipolo, David Ellner, Elliott Adler, Robin Leach, Robert Sutner, Raymond Grant, Simme Arthur, Hyman Feld and Morton Schiowitz.

In addition, many Americans living abroad also purchased IOS stock, some of whom I personally know. I believe that the offering was also made to a group of Americans living in Florida who were associated with an IOS real estate project there and that certain of them purchased IOS stock as well.

I have been informed that defendants contend that I knew that the prospectuses were false and misleading. The short answer to that contention is that if I ever suspected that the prospectuses were false and misleading, I would not have purchased IOS stock. I believed that IOS was, as described in the prospectuses, a healthy growth company, operated in a

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legitimate manner, and competently and ably managed. The fact that such outstanding firms as Drexel Harriman Ripley Incorporated, Banque Rothschild, Hill Samuel & Co. Limited, Guinness Mahon & Co. Limited, Pierson, Heldring & Pierson, Smith, Barney & Co. Incorporated, Investors Overseas Bank Limited and J.H. Crang & Co., were underwriting the offering, confirmed in my mind that the statements contained in the prospectuses were true.

On my own personal knowledge, I know that the following persons who sold IOS stock through the secondary offering were resident Americans: Robert Sutner, Elliott Adler, Morton Schiowitz, Philip Gordis, Lester Hayes, Hyman Feld, Howard Stamer and Robert Haft.

Sworn to before me this  
12th day of May, 1972.

Glady R. Fisher  
Notary Public

GLADYS R. FISHER  
Notary Public, State of New York  
No. 24-1230915  
Qualified in Kings County  
Commission Expires March 30, 1974

Howard Bersch  
Howard Bersch



**Affidavit of Kenneth L. Beaugrand in Opposition to  
Motion for Class Action Determination**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- -x

HOWARD BERSCH, :

Plaintiff, :

71 Civ. 5373

- against - :

DREXEL FIRESTONE, INC., et al., :

AFFIDAVIT IN OPPOSITION  
TO CLASS ACTION MOTION

Defendants. :

----- -x

)  
: ss.:  
)

KENNETH L. BEAUGRAND, being duly sworn, deposes and  
says:

1. I am a director of Investors Overseas Bank Limited ("IOB"), a defendant in the above action. I submit this affidavit in opposition to the motion by plaintiff seeking a declaration that this action may be maintained as a class action.

2. This affidavit is made upon information and belief. The sources of my information and the grounds of my belief as to matters set forth in this affidavit include my examination of certain records of IOB, my investigation of the relevant facts by inquiry of other persons having knowledge of IOB and its operations, and the knowledge of the affairs of IOB that I have acquired in the course of my relationship with that company.

3. At all relevant times, IOB was a Bahamas corporation and a subsidiary of I.O.S. Ltd. ("I.O.S."), a company organized under the laws of Canada with its principal executive offices in Geneva, Switzerland. IOB had its main office in the Bahamas and an office in Geneva, Switzerland. It neither had an office nor conducted business in the Southern District of New York or anywhere else in the United States.

The IOB Offering

4. On September 24, 1969, IOB issued a prospectus concerning the sale of 3,950,000 Common Shares of I.O.S. (the "IOB Offering"). A copy of the English version of that prospectus is annexed hereto as Exhibit 1. The prospectus was prepared and printed outside of the United States, in several languages, and distributed to prospective purchasers from outside of the United States. Payment for the shares by purchasers was made to IOB in Geneva, Switzerland, and the stock certificates were mailed out to purchasers from there. As stated in the prospectus, the shares sold on the IOB Offering were not registered in the United States nor were they listed or traded on any stock exchange or market in the United States.

5. The IOB Offering was one of three simultaneous, but separate, offerings of I.O.S. shares. The second offering was made only in Canada (the "Canadian Offering"). It was managed by a Canadian banking group, including defendant J. H. Crang & Company ("Crang"), and involved 1,450,000 shares.



The third, and largest, offering was underwritten by a group of international investment bankers, including the six firms named as defendants in this action. It involved the primary offering of 5,600,000 shares of newly issued stock of I.O.S. in a number of countries, but outside of the United States, Canada and Mexico (the "European Offering"). Each of these three offerings was made pursuant to a separate prospectus.

6. Unlike the European Offering, the IOB Offering, as well as the Canadian Offering, involved shares being sold by individual stockholders of I.O.S., not newly issued stock of the company, and the proceeds of the IOB and Canadian Offerings were received by such stockholders, not by I.O.S. Also, unlike the other two offerings, the IOB Offering was made to a limited number of narrowly defined purchasers.

#### The Purchasers of I.O.S. Stock

7. Thus, as expressly set forth on the first page of the prospectus (Exhibit 1 hereto), the shares which the I.O.S. stockholders sold through IOB were offered only to

"\* \* \* approximately 25,000 persons who are either (1) employees or sales associates of the Company [I.O.S.], (2) certain clients presently holding investments in managed funds or other products of the Company, or (3) persons who have had a long-standing professional or business relationship with the Company."

The IOB Offering, in short, was not directed to, nor did it reach, a public group of investors anywhere in the world. Instead, the offering was made to a restricted group of persons all of whom qualified by reason of their having a close relationship with the issuing company, I.O.S.

8. Nor was the IOB Offering, or the Canadian or European Offering, intended to reach the general investing public in the United States.

9. Pursuant to a settlement agreement entered into by I.O.S. with the SEC in May, 1967 -- as the IOB prospectus expressly stated (Exhibit 1 hereto, p. 29) -- I.O.S. and its affiliates were forbidden from selling securities to Americans, no matter where located, except for offers and sales outside the United States to officers, directors or persons associated with I.O.S. on a full-time basis. As a result, the Canadian and European Offerings were not directed to Americans at all, and the IOB Offering was only made to foreigners or American citizens who were affiliated with I.O.S., as provided in the SEC settlement order. The IOB prospectus clearly stated that the shares "offered by this prospectus are not registered under the United States Securities Act of 1933 and are not being offered in the United States of America or any of its territories or possessions or any areas subject to its jurisdiction" and every reasonable effort was made in connection with the offering to insure that no offers or sales were in fact made within the United States.

#### The Absence of American Investors

10. I am advised that the affidavits being submitted in opposition to plaintiff's present motion by the representatives of Crang and of the European underwriters state that, to their knowledge, no Americans purchased any of the 1,450,000 or 5,600,000 shares of I.O.S. stock sold on the Canadian and European Offerings, respectively. I understand that to be the case. Plaintiff Bersch, therefore, did not buy his I.O.S. stock on either of these two offerings.



it appears, took place outside the borders of the United States and had no impact on the American securities market or American investors.

11. As to the IOB Offering -- there, too, the underwriting and distribution originated outside the United States. No attempt was made on the offering to sell stock to the American investing public, but only to foreign investors and I.O.S.-related personnel. Some American citizens fell into the latter category.\* However, they comprised a miniscule percentage of the persons to whom the I.O.B. Offering was made and an even smaller, almost immeasurable, percentage of the investors to whom all three I.O.S. stock offerings were made. These persons were offered the chance to purchase stock because they worked for I.O.S., not because they were American citizens, and the offerings were made under circumstances designed to preclude sales to anyone within the borders of the United States.

12. As regards the United States, then, the IOB Offering, like the other two offerings, was a foreign offering, made almost exclusively to foreigners, of a foreign company's stock traded only on foreign markets, and the offering had

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\* This includes plaintiff, who concedes his relationship to I.O.S. See plaintiff's Answers to Interrogatories, dated February 1, 1972, Nos. 7-9.

no significant impact on the American securities market or American investors.

Plaintiff's Motion  
Should Be Denied

13. In light of the foregoing, I am advised by American counsel that plaintiff's present motion is lacking in merit and should be denied. Plaintiff should not be permitted, as he seeks, to maintain this action as a class action on behalf of all persons of all nationalities who purchased I.O.S. stock pursuant to all three offerings.

(Cpt. ¶ 2(a)(11).)

14. Counsel informs me that the class action determination sought by plaintiff is inappropriate under Rule 23, F.R.C.P., for a number of reasons, as summarized in the accompanying memorandum of law being submitted by counsel on behalf of IOB.

WHEREFORE, it is respectfully requested that the motion of plaintiff seeking an order declaring that this action may be maintained as a class action be denied.

\_\_\_\_\_  
Kenneth L. Beaugrand

Sworn to before me this  
day of May, 1972.

\_\_\_\_\_  
Notary Public





**Memorandum Opinion of Frankel, D. J.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

FRANKEL, D.J.

The submissions on this motion are substantial and interesting. The court has considered them with care and would normally incline to report the results of such study in some detail. However, the nature of the disposition now reached counsels against such treatment. The court must rule, but only for the preliminary purposes at hand, upon fundamental questions as to both jurisdiction and the merits; the rulings must perforce leave those questions for ultimate decision either way, whether following a trial or some dispositive motion later on. Similarly, the happenstance of this court's impending change in calendar practice makes it desirable that decisions affecting long-range management of this lawsuit be left open for the single judge to whom the matter will be assigned for all purposes. With these explanations for the relatively brief and limited character of the decision now rendered, the court announces the following conclusions:

(1) It is not possible (or desirable) to say now with confidence whether the transactions plaintiff assails are reachable under either or both of the 1933 and 1934 Acts. Defendants obviously took pains to structure their activities to avoid the reach of American securities laws. Whether they succeeded is a question that will probably merit extensive discovery. The evidence thus to be sought and explored will in all likelihood be intertwined with, and obtainable together with, the evidence on the facts of fraud



and concealment alleged by plaintiff. Whatever final decision may be reached on the applicability of the American securities laws, plaintiff has adduced enough to allow the case to proceed for the time being as a class action.

It is a complex question, not answerable by formula, how far a plaintiff must show chances of success before he should be allowed to go forward as representative of a class. Obviously, allowance of class-action treatment does not signify that the class must win or will probably win. At the same time, since the very existence of a class suit entails burdens for the opposing party or parties as well as the court, it is appropriate to require prospects more substantial than the mere ability to resist a motion to dismiss. How much must be shown will vary with the nature of the case and the means practically available for the demonstration. Here, as has been indicated, the requisite showing seems destined to entail a good deal of the factual exploration necessary to prepare the case for trial. Defendants, who possess the bulk of the requisite knowledge, do not move for summary judgment of dismissal. Plaintiff, even in advance of discovery, points to an array of circumstances making it entirely plausible to argue—if by no means prudent to predict with confidence—that the Securities Acts will be held applicable. As to activities within the United States, a partial list appears to include: American firms as lead underwriters, very possibly making key decisions here; an American accounting firm; American shareholders heavily involved in the arguably integrated group of offerings; sales to Americans within the United States; legal decisions and actions by American law firms affecting the terms and handling of the prospectuses. There are, similarly, arguments of substance that the issuing corporation, though legally “foreign,” was American in its management and in its impact both abroad and here. Still subject to firm demonstration or refutation, the thesis of effects upon the American securities market and the American economy cannot be said to be unsubstantial.

(2) Plaintiff has also made a case sufficient for present purposes that there are predominant common questions of law and fact justifying a class action under Rule 23(b)(3). The basic claim, affecting a broad class of purchasers, foreign and domestic, sounds in fraud. Cf. *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966). As things stand now, there is no occasion to divide the class of purchasers. It is feasible to leave for later determination, upon a fuller record, the question whether foreign purchasers will be entitled to invoke the protections and sanctions of American securities laws. For the present at least, all purchasers may be represented as a single class by the evidently energetic, competent and motivated team of counsel for the named plaintiff.

(3) Defendants raise a question as to whether foreign investors, whatever actual or constructive notice they receive, will be bound in their own courts by an adverse decision in the instant class action. But it is not possible to say what practical significance the question will have in the fuller unfolding of this action. As time goes by, the possibility of foreign suits against defendants herein will tend to diminish or disappear. The absence of class procedures in particular countries may militate against actions by individual investors. And, except for a Swiss proceeding seemingly criminal in nature and of dubious impact upon the defendants (who appear to have left Switzerland), there are no cases thus far pending abroad. Nevertheless, if defendants prevail against a class, they are entitled to a victory no less broad than a defeat would have been. The attempt to achieve that kind of reciprocal treatment should be manageable in the course of this action. It may require, in the court's discretion, that putative members be required to "opt in" or to face exclusion from the class for all purposes. It may, as has been suggested, become a moot question as supervening limitations periods render this in fact the only practical forum for asserted claims by foreign pur-



chasers. The subject is, in any event, suitable for inclusion in the large array of matters now being postponed.

(4) The bringing of this motion coincides closely with a substantial change in the procedures of this court. All of our civil cases are about to be assigned for all purposes to single judges. Thus, the odds favor assignment of the instant case to someone other than me. For that reason primarily, but for others already adumbrated as well, basic questions affecting the management of the case should be, and will be, left for the judge in charge of it. The keystone among such subjects is the matter of notice under subdivision (c)(2) of Rule 23. Given the uncertainties as to both jurisdiction and merits, it may be that a broad notice by newspaper advertisement will be deemed sufficient for now, to be supplemented by individual notices if and when the substantiality of plaintiff's claims becomes clearer. The question of expense, and who should bear it, is not readily answerable from the materials now before the court. The question of foreign purchasers—of how, and on what terms, they should have notice—has been touched upon as one of the matters warranting further development.

All such topics are left for later determination. The single question now resolved (and this, too, is of course open for reexamination under Rule 23(c)(1)) is as to the suitability of allowing the case to proceed as a class action. Plaintiff's motion is in this respect granted. The action may be maintained as a class action on behalf of all purchasers of IOS shares in the "IOS Public Offering," as detailed in the complaint, of 10,992,000 shares beginning in September 1969.

It is so ordered.

Dated: New York, New York  
June 28, 1972

MARVIN E. FRANKEL  
U.S.D.J.

85 A

**Consent Order (Ryan, D.J.)**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

TRICT COURT  
FILED  
DEC 27 1972  
S. D. OF N.Y.

----- x  
HOWARD BERSCH, : 71 Civ. 5373  
 : (SJR)  
Plaintiff, :  
-against- : ORDER ON  
 : CONSENT.  
DREXEL FIRESTONE, INC., et al., :  
 :  
Defendants. :  
----- x

Plaintiff having served a Notice to Produce Documents dated September 8, 1972 upon defendants Drexel Firestone, Inc. (formerly known as Drexel Harriman Ripley Incorporated) ("Drexel"), Guinness Mahon & Co. Limited ("Guinness Mahon"), Hill Samuel & Co. Limited ("Hill Samuel"), Pierson, Heldring & Pierson ("Pierson, Heldring"), Banque Rothschild, Smith, Barney & Co. Incorporated ("Smith, Barney"), J. H. Crang & Company Ltd. (formerly known as J. H. Crang & Co.), and Investors Overseas Bank Limited; and

Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring and Smith, Barney having joined in the Response of Defendants Drexel Firestone, Inc. et al. to Plaintiff's Request for Production of Documents; and

Plaintiff having made a motion pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure to enforce his Request to Produce Documents, originally returnable on November 2, 1972 at 10:00 A.M.; and

Plaintiff's motion having been adjourned to November 16, 1972 at 10:00 A.M. upon stipulation of all



parties thereto; and

Plaintiff having agreed to limit his discovery against defendants Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring and Smith, Barney, pending determination by the Court of the motions described in the last ordering paragraph, if such motions are timely made, to the following areas (and such defendants having reserved their position that such areas are without foundation in fact or are not legally material to such issues):

1. The significance of the fact that two lead underwriters were American firms.
2. The making of key decisions in the United States.
3. The significance of the fact that American accountants were employed.
4. Whether American selling shareholders were "heavily involved" in the "arguably" integrated group of offerings.
5. The extent of sales to Americans in the United States.
6. The extent to which legal "decisions" and "actions" regarding the prospectuses were made by American law firms.
7. Whether I.O.S., Ltd., although a foreign corporation, was "American in its management and in its impact both abroad and here."
8. Whether the offerings had an effect upon the American securities market and the American economy; and

Defendants Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring and Smith, Barney having agreed to produce the documents and information specified in the third and fourth ordering paragraphs of this Order; and

Plaintiff having agreed to withdraw his motion

against defendants Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring and Smith, Barney without prejudice on the basis of said agreements; and

The Court having entered an order on November 16, 1972, directing that an appropriate consent order be submitted without delay and that a pretrial conference be adjourned sine die to await completion of the scheduled discovery; it is hereby

ORDERED that plaintiff's discovery against defendants Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring and Smith, Barney, pending determination by the Court of the motions described in the last ordering paragraph, if such motions are timely made, be and it hereby is limited to the eight areas specified in the fifth paragraph of this Order; and it is further

ORDERED that plaintiff's motion be, and it is hereby, withdrawn without prejudice; and it is further

ORDERED that each of defendants Banque Rothschild, Guinness Mahon, Hill Samuel, and Pierson, Heldring produce, on or before January 29, 1973, the following documents and information:

(1) All documents designated by plaintiff's Notice to Produce Documents reflecting direct or indirect offers or sales of IOS stock: (a) in the United States or any of its territories or possessions or any areas subject to its jurisdiction (the "U.S."), (b) to nationals or citizens of or persons resident or normally resident in the U.S. ("U.S. persons"), (c) to partnerships or associations any of whose partners or members are U.S. persons ("U.S. partnerships or associations"), (d) to corporations



incorporated in, domiciled in or having their respective principal places of business in the U.S. or which are controlled by such corporations, U.S. persons, or U.S. partnerships or associations ("U.S. corporations"), or (e) to other persons for reoffering or resale directly or indirectly in the U.S., or to U.S. persons, U.S. partnerships or associations, or U.S. corporations; or relating to any other acts performed in the United States relating to the primary offering or either of the secondary offerings of IOS stock made in September 1969, subject to the limitation that the identity of customers will not be disclosed.

(2) Contracts and agreements among underwriters, dealer offering letters, management agreements, purchasing agreements with selling shareholders and documents reflecting the names and addresses of underwriters, banks and dealers who were solicited to participate in the offerings of Common Shares of I.O.S., Ltd. in September 1969, or who participated in the offerings, subject to the limitation that the identity of retail customers will not be disclosed.

(3) Correspondence or other communications with any federal or state agency or department, including the Securities and Exchange Commission and the Internal Revenue Service, relating to the offerings.

(4) A statement explaining the nature and extent of transactions in securities of United States companies arranged from September 1, 1969 to December 31, 1971 for clients who are nonresidents of the United States.

(5) A schedule of securities transactions executed from September 1, 1969 to December 31, 1971 for clients resident in the United States (identifying each

transaction by date and by city and state of residence address of client).

(6) A schedule of corporations to which such defendant sold IOS Common Shares in the Drexel Group offering which, to such defendant's knowledge, were controlled or owned in the amount of 10% or more by United States citizens or residents and the amount of IOS Common Shares purchased by each such corporation.

(7) All documents relating to activities by IOS (including any subsidiary or affiliated corporations) inside the United States.

(8) A statement identifying all corporations doing business in the United States which are subsidiaries of or affiliated with such defendant; and it is further

ORDERED that each of defendants Drexel and Smith, Barney produce, on or before January 15, 1973, the following documents and information:

(1) All documents designated by plaintiff's Notice to Produce Documents reflecting direct or indirect offers or sales of IOS stock: (a) in the United States or any of its territories or possessions or any areas subject to its jurisdiction (the "U.S."), (b) to nationals or citizens of or persons resident or normally resident in the U.S. ("U.S. persons"), (c) to partnerships or associations any of whose partners or members are U.S. persons ("U.S. partnerships or associations"), (d) to corporations incorporated in, domiciled in or having their respective principal places of business in the U.S. or which are controlled by such corporations, U.S. persons, or U.S. partnerships or associations ("U.S. corporations"), or (e)



to other persons for reoffering or resale directly or indirectly in the U.S., or to U.S. persons, U.S. partnerships or associations, or U.S. corporations; or relating to any other acts performed in the United States relating to the primary offering or either of the secondary offerings of IOS stock made in September 1969, subject to the limitation that the identity of customers will not be disclosed.

(2) Contracts and agreements among underwriters, dealer offering letters, management agreements, purchasing agreements with selling shareholders and documents reflecting the names and addresses of underwriters, banks and dealers who were solicited to participate in the offerings of Common Shares of I.O.S., Ltd. in September 1969, or who participated in the offerings, subject to the limitation that the identity of retail customers will not be disclosed.

(3) Correspondence or other communications with any federal or state agency or department, including the Securities and Exchange Commission and the Internal Revenue Service, relating to the offering.

(4) A statement describing (a) the non-clerical personnel of such defendant who performed acts outside the United States relating to the Drexel Group offering of IOS Common Shares, (b) the period of time during which they performed such acts, and (c) the general nature of such acts.

(5) A similar statement with respect to Shearman & Sterling.

(6) A similar statement with respect to Price Waterhouse & Co.

(7) All documents relating to activities by

IOS (including any subsidiary or affiliated corporations) inside the United States.

(8) A schedule listing all offices of such defendant outside the United States as of September 1969 and the number of employees (clerical and non-clerical) in each such office at that time.

(9) A statement giving the names and titles of all non-clerical personnel of such defendant who performed acts relating to the Drexel Group offering; and it is further

ORDERED that the above is without prejudice to plaintiff's right to request amplification or verification of any statement or schedule furnished by Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring or Smith, Barney or to seek further discovery in the eight areas specified in the fifth paragraph of this Order; and it is further

ORDERED that a pretrial conference be, and it hereby is, adjourned sine die to await completion of such discovery; and it is further

ORDERED that any motion by Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring or Smith, Barney addressed to the issues of subject-matter jurisdiction, personal jurisdiction, and inclusion of foreign purchasers in the plaintiff class shall be served on or before the sixtieth day following receipt by counsel for Drexel, Banque Rothschild, Guinness Mahon, Hill Samuel, Pierson, Heldring and Smith, Barney of written notice from counsel for plaintiff that plaintiff's discovery relating to such issues has been completed as to all defendants,



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with plaintiff's responding papers to be served on or before thirty days from the date of service of the moving papers, and reply papers (if any) to be served on or before fifteen days after the date of service of plaintiff's responding papers, but in no event less than fifteen days before the return date of such motion.

Dated: New York, New York  
December 27, 1972

61 SYLVESTER J. KAHN  
U.S.D.J.

CONSENTED TO:

SILVERMAN & HARNES

By 61 Sidney B. Silverman  
A Member of the Firm

One Rockefeller Plaza  
New York, New York 10020

Attorneys for Plaintiff

SULLIVAN & CROMWELL

By 61 Morris Schwartz  
A Member of the Firm

48 Wall Street  
New York, New York 10005

Attorneys for Defendants  
Drexel Firestone, Inc.,  
Guinness Mahon & Co. Limited,  
Hill Samuel & Co. Limited, and  
Pierson, Heldring & Pierson

DAVIS POLK & WARDWELL

By 61 Henry L. Kline  
A Member of the Firm

1 Chase Manhattan Plaza  
New York, New York 10005

Attorneys for Defendants  
Banque Rothschild and  
Smith, Barney & Co.  
Incorporated

**Order re Discovery (Ryan, D.J.)**  
**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF NEW YORK**

71 Civil 5373

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HOWARD BERSCH,

*Plaintiff,*

*v.*

DREXEL FIRESTONE, INC., *et al.*,

*Defendants.*

---

All discovery is to be completed by plaintiff by September 1, 1973 under order of December 27, 1972.

Proceedings thereafter shall be conducted pursuant to the aforesaid order of December 27, 1972.

So ordered.

Dated: New York, New York  
April 2, 1973

/s/ Sylvester J. Ryan

SYLVESTER J. RYAN  
United States District Judge



93A-1  
Excerpts from Deposition of Grayson T. Murphy, Relating to  
Document 45 of Appendix A to Plaintiff's Memorandum  
of Law in Opposition to Defendants' Motions

(pages 215A-223A, *infra*)  
Murphy

77

1  
2           Q       What function was Price Waterhouse to perform?

3           A       Well, as I recall, it was felt that IOS was  
4 such a complicated, complex corporate setup with so many  
5 businesses that the Drexel people felt that although it  
6 was an unusual thing to do, they wanted to take particular  
7 care that the financials would be accurate and so they  
8 retained Price Waterhouse to go over to Geneva and to make  
9 various investigations. There was a team of about six of  
10 them that went over and their function was to -- particu-  
11 larly function on the stub period, that six-month period we  
12 were talking about, and to come up with all the questions  
13 they could in regard to the financials, in regard to the  
14 accounting procedures, so that the Drexel people could  
15 satisfy themselves to the extent they could on the accuracy  
16 of the stub period.

17           Q       Did Price Waterhouse in fact come up with  
18 questions on the financials and accounting procedures?

19           A       Oh, quite a lot of them, yes.

20           Q       And were these questions referred to you,  
21 Mr. Murphy?

22           A       Not particularly to me. I was at some meetings  
23 when they were discussed but they were referred primarily  
24 to Mr. Coleman and Mr. Ambrose.

25           Q       Did you give consideration to the questions

posed by Price Waterhouse?

A I gave some considerations to them at the meetings I was involved in, yes.

Q Do you recall which items you gave consideration to?

A I really don't. A lot of different items were discussed.

Q Was there any consideration given based upon the Price Waterhouse reports to Drexel Harriman not continuing with the offering?

A Well, I think the feeling was that if the questions raised could not have been answered satisfactorily that they might not have continued but, in fact, they felt that they got satisfactory answers.

Q Who communicated the fact that satisfactory answers had been obtained to you?

A I don't recall who communicated it but the two persons who were involved in it from the point of view of Drexel were the two I have mentioned, Mr. Coleman and Mr. Ambrose.

Q Do you recall any discussions in New York at which you were present and at which the questions raised by Price Waterhouse were discussed?

A Yes. I attended one or two meetings, I think two.



1 THE WITNESS: I'd like to expand just a  
2 little on what I said about Price Waterhouse's  
3 function. Arthur Andersen was making certain checks  
4 of the financials for the stub period and  
5 Price Waterhouse suggested various procedures, ac-  
6 counting procedures, for them to follow in their  
7 checks.  
8

9 The underwriters relied, of course, quite  
10 heavily on Arthur Andersen who were regular account-  
11 ants even though they couldn't give certified figures  
12 for the whole operation for that six-month stub  
13 period so that the Price Waterhouse people were tied  
14 in quite intimately with the Arthur Andersen checks  
15 that were going on.

16 Q Did Arthur Andersen express any reason why  
17 it couldn't give full audited figures for the first  
18 six months of fiscal 1969?

19 A Yes.

20 Q What reasons did Arthur Andersen give?

21 A They said they couldn't get the required con-  
22 firmations within that period for various parts of the  
23 business. And As I said, they could get them for the  
24 banking financial end but not for any --

25 Q Was any consideration given to delaying the

1  
2 A Well, I think that Arthur Anderson and Clark  
3 Ambrose, primarily.

4 Q And from whom were the answers obtained?

5 A Well, they had discussions, I am sure, in  
6 these matters in Geneva and, perhaps, also in New York.  
7 I just don't remember.

8 Q With whom, in Geneva, did they have discussions?

9 A I don't remember. I do remember that there  
10 was a fair amount of discussions that went on in Geneva  
11 with the Arthur Anderson people and with the Price  
12 Waterhouse people but I can't pinpoint the times of those  
13 discussions.

14 Q With whom in New York were there discussions?

15 A Well, with Mr. Field, I remember, particularly.  
16 It may possibly have been somebody from Arthur Anderson  
17 there. I just don't recall.

18 Q Anybody else?

19 A Drexel.

20 Q Do you know what the substance of these meetings  
21 was?

22 A Well, the substance of the meetings was to  
23 discuss the various points that had been raised and to  
24 see what kind of a letter or memorandum Price Waterhouse  
25



1  
2 felt that they could give to Drexel as what you might call  
3 a comfort letter or comfort memorandum and then in  
4 addition to these detailed things, of which there were  
5 quite a number, there was an over-all question as to  
6 whether Price Waterhouse felt that Drexel could rely on  
7 Arthur Andersen's audits of the figures and on this  
8 Price Waterhouse, in the final memorandum or letter, in-  
9 dicated quite clearly they found nothing which they felt  
10 should prevent Drexel from relying on the work that had  
11 been done by Arthur Andersen.

12 Q Was there any discussion as to whether Drexel  
13 would go ahead with the offering if it didn't receive  
14 confirmation from Price Waterhouse that it, meaning  
15 Drexel, could rely upon Arthur Andersen's financials?

16 A None that I recall.

17 Q Where, to your knowledge, did Price Waterhouse  
18 issue its opinion that Drexel could rely upon Arthur  
19 Andersen's financial reports?

20 MR. SCHWARTZ: What do you mean by issue?

21 MR. ZIRIN: I object to the form.

22 Arthur Andersen's financials --

23 MR. SILVERMAN: Reports prepared by  
24 Arthur Andersen.

25 MR. SCHWARTZ: What do you mean by issue?

Excerpts from Deposition of Frederick M. Werblow  
country?

A Not to my knowledge.

Q Joseph L. Roth, he is a partner in Price Waterhouse, isn't he?

A He was.

Q Did he participate at all in Price Waterhouse's functions in connection with the IOS offering?

A He did.

MR. NOVELLO: I object to the form of the question, but the witness may answer.

Q What functions did he perform?

A He assisted in designing special checking procedures that Drexel requested IOS to request Arthur Andersen to carry out in connection with the June 30, 1969 unaudited financial statements.

Q Did you see the special checking procedures that Mr. Roth prepared?

A Yes.

Q Where did Mr. Roth prepare these procedures?

A Well, he assisted me and my staff in both Geneva and in Ferney-Voltaire.

Q Did he do work on the special checking procedures in New York, to the best of your knowledge?



93 A-7

1 A No, he did not.

2 Q Did you see the special checking procedures in  
3 New York?

4 MR. NOVELLO: I object to the form of  
5 the question, but the witness may answer, if he under-  
6 understands that.

7 A I am not sure that I understand the question.  
8 The checking procedures were developed while we were in  
9 Europe.

10 Q To whom were they given?

11 A I believe that they were given to Mr. Ambrose.  
12 They might have been given to Mr. Browning of Drexel.

13 Q Was there any discussion with Arthur Andersen  
14 about the special checking procedures?

15 A There was extensive discussion with Arthur Ander-  
16 sen.

17 Q Where did the discussions take place?

18 A In Geneva, in Ferney-Voltaire, in London.

19 Q Anywhere else?

20 A I think those were the principal locations in  
21 Europe.

22 Q Were there any discussions in the United States  
23  
24  
25

1 Q Did you ask for any at that meeting?

2 A I think the one thing that we did ask was whether  
3 they had issued a report on the procedures or internal  
4 accounting controls of IOS for 19 -- in connection with  
5 their 1968 audit.  
6

7 Q What was the answer to that request?

8 A That they were currently in the process of doing  
9 so.

10 Q Did you ask that you be furnished with a copy of  
11 such a report?

12 A I don't recall.

13 Q Did you in fact receive a copy of a report prepared  
14 by Arthur Andersen on the internal controls of IOS?

15 A Yes.

16 Q Where did you receive such a report?

17 A In Geneva.

18 Q Did you bring it back with you to New York?

19 A Yes.

20 Q Did you discuss it with people in New York?

21 A Not that I recall. I discussed it in Geneva, or  
22 in other places in Europe.

23 Q Is that report, to the best of your knowledge,  
24 in Price Waterhouse's files today?  
25



1 Arthur Andersen, subsequent to this time, gave their opinion  
2 and gave their consent and gave their comfort letter in  
3 connection with the IOS offering and I would think that  
4 was the evidence that Drexel was looking for as to the ul-  
5 timate conclusion that Arthur Andersen reached with respect  
6 to this and anything else that they were considering.

7  
8 Q Did Price Waterhouse give Drexel a comfort letter?

9 MR. NOVELLO: I object to the form of  
10 the question, but the witness may answer.

11 MR. SCHWARTZ: I object to the form of  
12 the question.

13 A We gave a special report. I don't think I would  
14 characterize it as a comfort letter. I would characterize  
15 a comfort letter as something that ones auditors give to  
16 an underwriter and IOS were the auditors -- pardon me,  
17 Arthur Andersen were the auditors for IOS and Drexel did re-  
18 ceive a comfort letter from Arthur Andersen.

19 Q Did you see the comfort letter that Drexel re-  
20 ceived from Arthur Andersen?

21 A We saw earlier drafts of the comfort letter, Mr.  
22 Silverman. I don't recall specifically at the moment  
23 whether I saw the final letter or not.

24 Q In the course of your work in Geneva, did you have  
25

1           A       General supervision of the quality of the work for  
2  
3 all of these offices; consultation on special accounting  
4 and auditing problems. That would also be the main areas.

5           Q       When you are called upon to give supervisory ser-  
6 vices, is it necessary for you to familiarize yourself with  
7 the work done by others at Andersen on a particular project?

8           A       Occasionally, yes; depends on the problem.

9           Q       Were you called upon to perform general supervision  
10 of the quality of the work performed by Arthur Andersen in  
11 connection with the IOS public offering?

12          A       No, sir.

13          Q       Were you called upon to perform any services on  
14 behalf of IOS in connection with that offering?

15                   MR. ZIRIN:       Objection as to form. Can you  
16 rephrase that? Objection to "that offering," and also  
17 "on behalf of IOS."

18          Q       Did you perform any services in connection with  
19 the IOS public offering?

20          A       I attended one meeting in New York in connection  
21 with our work in 1969, on what I understood was to be a public  
22 offering, and I assume that it was.

23                   I didn't perform any services, other than attend  
24 that meeting.

25          Q       When did that meeting take place?



1 A Well, the record indicates it was July 11, 1969.

2 Q Where did that meeting take place?

3 A I recall, it was in Harriman Ripley's office  
4 downtown New York someplace.

5 Q Who asked you to attend that meeting?

6 A I don't recall.

7 Q What was the reason for your attending the meeting?

8 A To the best of my recollection, the other men at-  
9 tending were from European offices, and I was asked to attend  
10 just in case I could be helpful to them.

11 Q Who asked you to attend?

12 A I don't recall.

13 Q Well, in the normal course of events, who would  
14 ask you, Mr. Duncan, to attend a meeting?

15 MR. ZIRIN: Objected to as speculative.

16 MR. SILVERMAN: Are you going to instruct  
17 him not to answer?

18 MR. ZIRIN: In that form.

19 Q Who was your supervisor in 1969?

20 A I didn't have any supervisor in 1969.

21 Q Well then, who made decisions as to what work you  
22 were to perform?

23 A I make my own decisions.

24 Q And did you make the decision to attend that  
25

1

2

meeting?

3

A Yes.

4

Q What prompted you to make that decision?

5

A Well, someone asked me to, and I have testified

6

that I don't recall who asked me.

7

In the normal course it would be the partner in

8

charge of the engagement who would ask to have someone at-

9

tend. I don't recall whether that was the case here.

10

Q Who was the partner in charge of that engagement?

11

A Mr. Walter Tenz from the Milan office of <sup>Arthur</sup> ~~Brenn~~

12

~~Andersen,~~  
~~Hannigan~~

13

Q How long did the meeting last?

14

A I have only a vague recollection that it went into

15

the evening, and I seem to recall that I left before the

16

meeting was over.

17

Q Were you there when the meeting began?

18

A I don't remember. I seem to recall that there

19

were other people present at the office at the time I arrived.

20

Now, whether the meeting had commenced before I arrived, I

21

don't know.

22

Q Well, prior to attending this meeting, did you meet

23

with Mr. Walter Tenz to discuss the meeting and his format,

24

agenda?

25

A I don't think I did.



1 made in connection with the public offering. They were made  
2 as a regular year-end audit of IOS, for purposes of reporting  
3 to its stockholders.  
4

5 Q How were you aware of the fact that Arthur Ander-  
6 sen performed auditing services for the years 1967 and 1968?

7 A IOS is a large firm; I know about its clients,  
8 its larger clients. I can tell you the same thing about many  
9 clients in many other offices.

10 Q And you knew that Arthur Andersen were the account-  
11 ants for IOS; is that correct?

12 A Yes. The work was done in Europe out of our, I  
13 believe out of the Zurich office. I am not sure at that  
14 point whether we were in Geneva or not.

15 Q Now, the meeting that you attended in July, do you  
16 recall the substance of what was discussed at that meeting?

17 A Yes. The general substance was what type of work  
18 the company would want us to perform in connection with the  
19 proposed public offering.

20 Q Who from the company was there to make that request?

21 MR. ZIRIN: That assumes that someone from  
22 the company had to make the request at the meeting.

23 A I don't recall who was there.

24 Q Mr. Leary there?

25 A I just said, I don't recall.

The discussion seemed to be primarily between the Drexel Harriman representatives and Walter Tenz and Matt Tiffert, which didn't take the form of a request so much as a discussion as to what it was possible to do at that point.

Q What did they ask Arthur Andersen to do? What was asked of Arthur Andersen?

A I believe the initial request was the possible performance of an audit as of June 30, 1969.

Q Anything else?

A That was all. Any other comments would relate to that subject.

Q Did you speak on that subject?

A No, sir.

Q Who did?

A Mr. Tenz and Mr. Tiffert.

Q What did they say?

A General substance of their comment was that it was not possible to make an audit within the time frame that they were discussing.

Q What was said by anybody else on that topic, that you can recall?

A I don't recall.

You must understand that these discussions took place over an extended period of time, dealt with a number of



1

2

Q What did you say to them?

3

4

5

6

7

8

9

10

11

A I don't think I said anything to them. As I recall the substance, it was a very short conversation. And whoever was speaking, Tenz or Tiffert, indicated that they recognized that the proscribed practice in this country--and again, I don't recall whether it was the proscribed practice at that point, or whether shortly thereafter it became the proscribed practice, but they recognized that what they were doing was not necessarily in accordance with proscribed practices in this country.

12

13

14

15

16

17

However, they were in accordance with traditional accounting practices in Europe, which is where the company resided, where the audit was being made, and where it was being put out. Also, that the treatment that they proposed corresponded with the firm's view as to how such items should be presented.

18

19

Q Did you discuss that matter with anybody else at Arthur Andersen?

20

21

22

A No.

Q Did you express an opinion that, in your view, that was the correct way to present it?

23

24

A I think I indicated that I thought it was acceptable, because of the site of the work.

25

Q But you recognized that at the time that method of

Excerpts from Deposition of Walter S. Ruegger

A Because Arthur Lipper had a mutual fund bookkeeping service, of which I.O.S. Proprietary or rather F.O.F. Proprietary availed itself, purely for record keeping purposes.

Q Are you saying that F.O.F. Prop's books and records were maintained in the offices of Arthur Lipper Corporation?

A A portion of F.O.F. Prop's books and records were maintained in the office of the Arthur Lipper Corporation.

Q Would you describe the books and records of F.O.F. Prop that were maintained at the offices of Arthur Lipper Corporation?

A They consisted primarily of the portfolio and of the funds, being the securities, ledgers, records as to dividends and interest received on such securities; and the custodial relationship of such securities.

MR. ZIRIN: Read back the last question and answer.

(The question and answer was read back by the Reporter.)

Q Where were Arthur Lipper's offices located?

A I believe 120 Broadway, at the time; but



1 Q What did you have to do?

2 A Verify the physical existence or the  
3 custodial responsibility for these securities,  
4 accountability for these securities.  
5

6 Q How did you go about verifying the physical  
7 existence of the securities?

8 A All holdings of F.O.F. Proprietary were  
9 at the bank of New York, who furnished us with  
10 confirmations with respect to the securities held as  
11 of any audit date.

12 Q Which bank of New York?

13 A I don't know whether it is the main office.

14 THE WITNESS: Is it 40 Wall Street?

15 Q But it was a New York office?

16 A A New York office.

17 Q To whom where these records furnished?

18 MR. ZIRIN: What records?

19 A What records?

20 Q Custodial records.

21 MR. ZIRIN: Do you mean the confirmations?

22 MR. SILVERMAN: Yes.

23 A They were direct confirmations from the  
24 custodian to us, as an accounting firm, as independent  
25 accountants.

1  
2 Arthur Lipper would receive or the mutual fund  
3 services department would receive.

4 Q These were records that the Arthur Lipper  
5 Corporation made available to you; is that correct?

6 A That is correct.

7 Q Was it your understanding that the Arthur  
8 Lipper Corporation made these same records available  
9 to your predecessor?

10 A Again, I would surmise that they did.

11 Q When you finished reviewing those records,  
12 and that is the dividends received records, what did  
13 you do with them?

14 A I would return them to the company, since  
15 they were their records.

16 Q Did you make copies of it?

17 A No, sir.

18 Q Did you make work sheets?

19 A Yes. They were part of the audit evidence.  
20 They were shipped to Geneva.

21 Q Did you keep records of your work sheets?

22 A No, sir.

23 Q You sent your work sheets along with the  
24 other audit evidence to Geneva; is that right?

25 A Right.



1  
2 Drexel prospectus, I think we will all know what  
3 it is, for the purposes of this case.

4 MR. SILVERMAN: All right.

5 BY MR. SILVERMAN:

6 Q My question to you was, do you know, of your  
7 own knowledge, whether any Arthur Anderson personnel  
8 worked on the Drexel prospectus?

9 A Of my own knowledge, no. Nobody did.

10 Q Do you have any hearsay knowledge?

11 A May I understand what you mean by "worked  
12 on the prospectus"? Do you mean worked on the  
13 financial statements or certified to financial  
14 statements that appeared later on in the prospectus?

15 Q Yes; did anyone work on it?

16 A The financial statements in that prospectus  
17 were covered by our Zurich office. People in the  
18 Zurich office and our resident staff in Geneva  
19 performed the bulk or practically all of the audit  
20 work behind all this.

21 Q Did you hear, in the New York office that  
22 any New York personnel of Arthur Anderson were working  
23 on the Drexel prospectus?

24 MR. ZIRIN: Do you mean, worked on  
25 the audit of the financial statements that appear

1  
2 Q Did you do any work on the Fund of Funds  
3 Proprietary audit in July of 1969 or August of 1969  
4 or September of 1969?

5 A No, sir.

6 Q Who gave you the assignment?

7 A Mr. Dunkin was head of our auditing  
8 practice in New York. I would imagine he made the  
9 assignment. He would be the logical man to make it.

10 Q Is it your testimony that from July, 1969  
11 until December you did nothing on F.O.P. Prop?

12 A I shouldn't say until December; until the  
13 preliminary work for the December audit. I was not  
14 responsible for the June 30 audit, which I couldn't  
15 be because I wasn't a partner to the firm.

16 Q Were you working on it in another capacity?

17 A The only thing I can remember that remotely  
18 relates to this is attending a meeting at the offices  
19 of Drexel, Harriman & Ripley; in the early part of  
20 July, I only attended the morning session of that  
21 meeting as I was asked by Mr. Dunkin to attend it  
22 with him because I had been assigned to this particular  
23 engagement.

24 Q Prior to attending the meeting, did you  
25 make any attempt to familiarize yourself with the



1  
2 Q Did your audit work concern the total assets  
3 held by F.O.F. Prop and F.O.F.?

4 A It only concerned the assets held by F.O.F.  
5 Prop which was not the total assets of F.O.F. F.O.F.  
6 Prop is a subsidiary of F.O.F.

7 Q About how much of F.O.F. assets are comprised  
8 of its holdings in F.O.F. Prop, do you know?

9 MR. BUSCHMAN: At the time that he  
10 was doing the work?

11 MR. SILVERMAN: Yes.

12 Q At the time that you were doing the work.

13 A I would say the bulk of these assets is  
14 represented by securities which are in F.O.F. Prop.

15 Q Would you say more than 90 per cent?

16 A I would have to guess.

17 Q But certainly a majority?

18 MR. ZIRIN: No, he said, he would have  
19 to guess.

20 You are not supposed to guess.

21 MR. SILVERMAN: I do not know of any  
22 rule that you are not allowed to guess.

23 MR. ZIRIN: I think you do.

24 Q Was the majority of F.O.F. assets held by  
25 F.O.F. Prop?

1  
2 its wholly owned subsidiary, F.O.F. Prop; is that  
3 correct?

4 MR. BUSCHMAN: I object to the question.

5 A That is correct.

6 MR. ZIRIN: I think the question was  
7 clearly misleading, because, how could F.O.F.  
8 securities be held by another entity. I think  
9 you are asking him, if anything, for a legal  
10 conclusion.

11 MR. SILVERMAN: He has already answered.

12 MR. ZIRIN: I move to strike the answer.

13 MR. BUSCHMAN: I agree.

14 MR. SILVERMAN: I deny your motion.

15 MR. BUSCHMAN: Off the record.

16 (Discussion off the record.)

17 BY MR. SILVERMAN:

18 Q Do you know whether Arthur Anderson's auditor  
19 that had been working on F.O.F. Prop supplied any  
20 information to Geneva to be used in connection with  
21 the I.O.S. prospectus, the Drexel prospectus?

22 A Of my own knowledge, no; and thinking about  
23 it logically, there shouldn't be any. The funds  
24 are not part of the I.O.S. financial statement.

25 Q The operations of the fund as revealed in



## Notice of Motion of Arthur Andersen &amp; Co. to Dismiss

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

HOWARD BERSCH,	:	
	:	
Plaintiff,	:	71 Civ. 5373 (SJR)
	:	
-against-	:	
	:	NOTICE OF MOTION
DREXEL FIRESTONE, INC., et al,	:	TO DISMISS, OR
	:	FOR OTHER RELIEF
Defendants.	:	
	:	
----- x		

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Edward J. Ross, sworn to the 31st day of October, 1973, and the exhibit attached thereto, the depositions, the affidavits as to foreign law submitted in support of the motions being made simultaneously herewith by certain other moving defendants, and all of the proceedings heretofore had herein, defendant Arthur Andersen & Co. will move this Court, at the United States Court House, Foley Square, New York, New York, Room 1106 thereof, on December 20, 1973, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order

(i) pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing this action as to defendant Arthur Andersen & Co. for lack of jurisdiction over the subject matter; or, in the alternative,

(ii) pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, vacating the Order of the Hon. Marvin E. Frankel, made and entered herein June 28, 1972, or altering and amending said Order to provide that foreigners who purchased shares

of capital stock of I.O.S., Ltd. abroad should be excluded from the class in behalf of whom this action is allegedly brought; and

(iii) granting such other or further relief as to the Court may seem just and proper.

Dated: New York, New York  
October 31, 1973.

Yours, etc.,

BREED, ABBOTT & MORGAN  
Attorneys for Defendant  
Arthur Andersen & Co.  
One Chase Manhattan Plaza  
New York, N.Y. 10005  
(212) 944-4800

TO:

SILVERMAN & HARNES  
Attorneys for Plaintiff  
One Rockefeller Plaza  
New York, New York 10020

DAVIS POLK & WARDWELL  
Attorneys for Defendants  
Smith Barney & Co. Incorporated  
and Banque Rothschild  
1 Chase Manhattan Plaza  
New York, New York 10005

SULLIVAN & CROMWELL  
Attorneys for Defendants  
Drexel Firestone, Inc.,  
Pierson, Heldring & Pierson,  
Guinness Mahon & Co. Limited,  
and Hill Samuel & Co., Limited  
48 Wall Street  
New York, New York 10005

WILLKIE FARR & GALLAGHER  
Attorneys for Defendants  
J. H. Crang & Co., Ltd.  
1 Chase Manhattan Plaza  
New York, New York 10005

PAUL WEISS RIFKIND WHARTON & GARRISON  
Attorneys for Defendants  
Investors Overseas Bank, Ltd.  
345 Park Avenue  
New York, New York 10022



90 A  
Affidavit of Edward J. Ross in Support of  
Motion to Dismiss

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
HOWARD BERSCH, :  
 :  
Plaintiff, :  
 :  
-against- : 71 Civ. 5373 (SJR)  
DREXEL FIRESTONE, INC., et al, : AFFIDAVIT OF  
 : EDWARD J. ROSS IN  
Defendants. : SUPPORT OF MOTION  
 : TO DISMISS, OR  
----- x FOR OTHER RELIEF

STATE OF NEW YORK )  
 : ss.:  
COUNTY OF NEW YORK )

EDWARD J. ROSS, being duly sworn, deposes and says:

1. I am a member of Breed, Abbott & Morgan, attorneys for defendant Arthur Andersen & Co. ("Arthur Andersen"). I make this affidavit in support of Arthur Andersen's motion under Rule 12(b) to dismiss the complaint for lack of jurisdiction over the subject matter or, in the alternative, pursuant to Rule 23(c)(1) to vacate or alter and amend the Order of the Honorable Marvin E. Frankel, entered herein June 28, 1972. Arthur Andersen's legal position is set forth in its accompanying Memorandum of Law.

2. This motion is also based, among other things, on the affidavit of Walter W. Ruegger, sworn to April 28, 1972, the original of which was filed with this Court on or about said date, and a copy of which is annexed hereto as Exhibit A.

PRIOR PROCEEDINGS

3. The summons and complaint were served on Arthur Andersen on December 13, 1971.

(a) The complaint alleges that plaintiff Bersch bought six hundred shares of I.O.S., Ltd. ("IOS") common stock

in September, 1969, as "part of a public offering of 10,992,000 shares of IOS Common Stock" (§ 2(a)(i)); that the shares "were sold to United States citizens residing in the United States and abroad, and to foreign nationals" (Id.); that class members "approximate 100,000 persons" (§ 2(a)(ii)), who, perforce include Germans, Swiss, English, French and other "foreign nationals"; that Arthur Andersen "failed to observe generally accepted accounting principles in the course of its audit of IOS" (§ 14); that the "financial statements of IOS certified by [Arthur] Andersen were false and misleading" (Id.); that Arthur Andersen "should have withheld its certification of IOS' financial statements in view of the chaotic state of IOS' business records" (§ 15); that Arthur Andersen falsely "represented that IOS maintained proper books and records, that IOS would continue as a going concern, that no subsequent events had been discovered which would affect the accuracy, relevance and interpretation of the certified financial statements, that the financial statements certified were as current as was appropriate for the business that IOS was in, for inclusion in a prospectus and were accurate" (§ 15); and that Arthur Andersen "did not make a reasonable investigation and did not have reasonable ground to believe that the financial statements certified by it were not false and misleading" (§ 19).

(b) Arthur Andersen, by its answer filed on or about January 14, 1972, denied the material allegations of the complaint and alleged certain affirmative defenses.

4. On April 7, 1972, plaintiff moved, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, for an order declaring that this action "can be maintained as a class suit". On June 28, 1972, the Hon. Marvin E. Frankel entered a tentative



Order, based on a decision of "limited character", and held that "plaintiff has adduced enough to allow the case to proceed for the time being as a class action" (p. 2). Emphasizing the tentative nature of his decision, Judge Frankel said that the "suitability of allowing the case to proceed as a class action" remained "open for re-examination under Rule 23(c)(1)" (p. 7). In so deciding, Judge Frankel authorized "extensive discovery" to determine "whether the transactions plaintiff assails are reachable under either or both of the 1933 and 1934 Act" (p. 2).

5. Pursuant to Judge Frankel's Order, "extensive discovery" conducted by plaintiff ensued, in which Arthur Andersen participated. Accordingly, the deposition of Wilbur S. Duncan, a partner in the New York office of Arthur Andersen was taken on July 17, 1973, and the deposition of Walter W. Ruegger, another partner in the New York office, was taken on August 29, 1973. Arthur Andersen also produced numerous documents to plaintiff's attorney, pursuant to request.

#### WHAT DISCOVERY REVEALED

6. The depositions of Messrs. Duncan and Ruegger demonstrated that the work performed by Arthur Andersen in connection with the IOS public offerings was performed in Europe, under the direction of Arthur Andersen's Zurich office. The testimony showed that Mr. Walter Tenz, a Swiss citizen resident in Milan, was the engagement partner who was ultimately responsible for the work done by Arthur Andersen in connection with the IOS public offerings.

7. Arthur Andersen's work in the United States simply involved attendance at one meeting in New York, at the offices of one of the underwriters, in which the discussion related solely to the Drexel offering, and in which Mr. Tenz and a Mr. Matthew Tiffert both of Arthur Andersen's Zurich

office informed the Drexel underwriters of a decision, - obviously made in Europe, - that it was not possible at that time to perform an audit of the financial statements of IOS as of June 30, 1969 in time for inclusion in the Prospectus. The testimony showed that Duncan also attended the meeting in case he could be of assistance, and Ruegger attended only part of the meeting, for the same purpose.

8. The testimony further disclosed that as auditor of Funds of Funds, Limited ("Fund of Funds"), Arthur Andersen confirmed assets of Fund of Funds Proprietary, Limited ("FOF Proprietary"), a subsidiary of Fund of Funds, by performing certain standard procedures, such as counting securities held by FOF Proprietary, or confirming such securities with the custodian. Although both FOF and FOF Proprietary were headquartered in Europe, a broker, Arthur Lipper Corporation, which performed record keeping functions for FOF Proprietary, happened to have its office in New York, where Arthur Andersen performed its work in this regard. Arthur Andersen's audit work relative to Fund of Funds was not used in connection with the financial statements of IOS appearing in any of the three prospectuses covering the IOS public offerings, which are the subject of the complaint, since the funds were not included in such financial statements.

9. As the annexed affidavit of Mr. Ruegger shows, Arthur Andersen's field work relative to Fund of Funds Proprietary came as an interoffice referral from Geneva to Arthur Andersen's New York office. At the conclusion of the field work, the audit evidence was sent to Geneva where the substantive work was done.

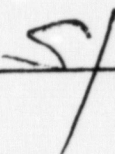
10. In short, - assuming it could be established that Arthur Andersen made any misrepresentations whatsoever, which is denied, - there is no evidence in the record that Arthur



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Andersen made any misrepresentations within the United States, and the conduct for which it is criticized in the complaint is firmly established as having occurred solely in Europe. Accordingly, as demonstrated in Arthur Andersen's accompanying Memorandum of Law, such conduct is beyond the reach of the 1933 or 1934 Acts.

WHEREFORE, it is respectfully requested that Arthur Andersen's motion be in all respects granted.

  
Edward J. Ross

Sworn to before me this  
31st day of October, 1973.

\_\_\_\_\_  
Notary Public

DONALD L. BLOOM  
NOTARY PUBLIC STATE OF NEW YORK  
No. 11443-01  
Qualified in New York County  
Certificate filed in New York County  
Comm. Exp. 12/31/76

101A  
Affidavit of Walter W. Ruegger, Exhibit A  
Annexed to Affidavit of Edward J. Ross

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
HOWARD BERSCH, :  
 : 71 Civ. 5373  
Plaintiff, :  
-against- : AFFIDAVIT  
 : IN OPPOSITION  
DREXEL FIRESTONE, INC., et al., :  
Defendants. :

----- x  
STATE OF NEW YORK )  
 : ss.:  
COUNTY OF NEW YORK )

WALTER W. RUEGGER, being duly sworn, deposes and  
says:

1. I am a partner in the New York office of defendant Arthur Andersen & Co. ("Arthur Andersen"). I make this affidavit in opposition to plaintiff's motion for an order determining that this action may be maintained as a class action.

2. Arthur Andersen is an international firm of independent public accountants and was independent public accountants of defendant I.O.S. Ltd. ("IOS") from January 24, 1958 to April 28, 1971. As independent public accountants of IOS, Arthur Andersen was engaged in Switzerland to examine the consolidated year-end financial statements of IOS and express an opinion with respect thereto. At the time of the three offshore offerings of IOS common stock, which are the subject of the complaint, IOS was a non-resident company organized under the laws of Canada with its principal office in Geneva. It was the parent of an international sales and financial service organization, principally engaged in the sale



of mutual funds, life insurance and other equity products.

3. Arthur Andersen expressed an opinion with respect to the consolidated balance sheet of IOS as of December 31, 1958 and the related statements of consolidated income and retained earnings for the five years then ended. Arthur Andersen also expressed an opinion (1) with respect to the consolidated balance sheet of IOS Financial Holdings Limited ("IOS Financial"), an English corporation and a wholly-owned subsidiary of IOS, as of December 31, 1968 and the related statements of consolidated income, retained earnings and legal and special reserves for the three years then ended; (2) with respect to the consolidated balance sheet of IOS Real Estate Holdings Limited ("IOS Real Estate"), a wholly-owned English subsidiary of IOS, as of December 31, 1968 and the related statements of consolidated income and retained earnings from commencement of operations (October 1966) to December 31, 1968; and (3) with respect to the consolidated balance sheet of IOS Insurance Holdings Ltd. ("IOS Insurance"), a Canadian subsidiary of IOS, as of December 31, 1968 and the related statements of consolidated income and retained earnings for the three years then ended. Each of the Arthur Andersen opinions relative to IOS, IOS Financial and IOS Real Estate was datelined "Zurich, Switzerland, April 15, 1969." The Arthur Andersen opinion relative to IOS Insurance was datelined "London, E.C.2, April 15, 1969."

4. All four of the said opinions of Arthur Andersen appeared in a prospectus relating to an underwritten primary offering of 5,600,000 newly issued Common Shares of IOS (the "Primary Offering"). Arthur Andersen understood what is clear on the face of the prospectus and underwriting documents that the shares of IOS stock under the Primary Offering were distri-

buted wholly outside the United States, Canada and Mexico and not to citizens or residents of the United States. All four of the said Arthur Andersen opinions also appeared in two other prospectuses relating to two secondary offerings of already outstanding Common Shares of IOS, which occurred on or about the same date as the Primary Offering. The two secondary offerings were by a consortium of Canadian underwriters managed by defendant J. H. Crang & Co. Limited (the "Crang Offering") which covered 1,450,000 Common Shares of IOS and by defendant Investors Overseas Bank, Limited, a wholly owned subsidiary of IOS, (the "IOB Offering") which covered 3,950,000 Common Shares of IOS. Arthur Andersen also understood from officers of IOS that the stock involved in the Crang Offering would not be sold to citizens or residents of the United States. Arthur Andersen likewise understood that no IOS Common Shares would be sold in the IOB Offering either in the United States or to any United States citizens or residents outside the United States (except for full time employees of IOS and its affiliates).

5. Arthur Andersen was also informed by IOS officers of a consent order made by the United States Securities and Exchange Commission ("SEC") on May 23, 1967, forbidding IOS and its affiliates to engage in any activity subject to the jurisdiction of the SEC and, with exceptions, not here pertinent, barring IOS from making any:

"sales of securities to United States citizens or nationals wherever located, except for . . . offers and sales outside of the United States (and its territories, possessions, or commonwealth subject to the jurisdiction of the United States) to officers, directors and full-time personnel of IOS and its subsidiaries. . . ."



Arthur Andersen therefore understood that any sales to IOS employees or others in the United States or to United States citizens resident abroad, other than IOS employees, would violate the terms of the SEC consent order, and, therefore, would not be made.

6. All work of Arthur Andersen in connection with its examination and opinions with respect to the financial statements of IOS and its subsidiaries (other than certain routine field work), which appear in the prospectus relating to the Primary Offering, that relating to the Crang Offering and that relating to the IOB Offering, was done in Geneva where, as noted above, IOS had its principal office. At the time of the issuance of the said opinions, Arthur Andersen had no formal Geneva office. Geneva-based personnel were then attached to our office in Zurich where the said opinions relative to IOS were datelined, as previously noted. The largest segment of Arthur Andersen's staff assigned to the IOS engagement performed their work in Geneva or in consultation with our Geneva staff. All of the substantive work of Arthur Andersen with respect to the IOS financial statements challenged in the complaint was done by Arthur Andersen's Geneva staff.

7. In connection with the examination of the financial statements of any client of Arthur Andersen which has significant operations or assets located at a place removed from the client's principal place of business, it is common within our firm for the engagement office of Arthur Andersen to refer the field work relating to such assets or operations to the office nearest their location. This practice is called an inter-office referral.

8. In the case of Arthur Andersen's work in connection with its opinions relative to the financial statements of IOS and its subsidiaries which appear in the three

prospectuses, Arthur Andersen's Geneva staff referred certain field work to Arthur Andersen offices in Paris, London, Milan, Canada and the United States. Accordingly, all of the material workpapers forming a basis for Arthur Andersen's four opinions appearing in the three prospectuses are located in Geneva except for workpapers which may have been retained by local offices for their own records.

9. I am personally familiar with the scope and nature of the work relative to IOS which Arthur Andersen in Geneva referred to our New York office. In connection with our examination of the consolidated financial statements of IOS, appearing in the three prospectuses, the New York office verified the securities portfolio and other assets and liabilities of Fund of Funds Proprietary, Limited ("FOF Proprietary"), a subsidiary of Fund of Funds, Limited ("FOF"), which was in turn managed by IOS. We performed this examination by generally accepted auditing tests; namely, checking that the securities existed either by physical count or confirmation. We also verified that the income on such securities was properly recorded, and confirmed securities accounts of FOF. The financial statements of FOF Proprietary and FOF, however, were not included in the consolidated financial statements of IOS which appear in the three prospectuses. Other field work was done by two other United States offices of Arthur Andersen with respect to assets or operations of IOS subsidiaries located near those offices.

10. The New York referral work done by Arthur Andersen, like the referral work done at our other two United States offices in connection with the IOS engagement, was wholly incident to the substantive work done in Geneva. Upon completion of their assigned tasks, our United States offices transmitted their findings to Geneva where ultimate responsibility with respect to Arthur Andersen's examination and opinion was exercised.

11. I have read the affidavit of Jewel H. Bjork, sworn to April 7, 1972, which suggests that a representative



of Arthur Andersen testified in Geneva that the "accounting work and other matters pertaining to the preparation of the Prospectus were done in New York." I know of my own knowledge that, except as hereinabove set forth, no such accounting work was done in New York. I have communicated by Telex with Mr. Walter Tenz, managing partner of Arthur Andersen's Milan office and IOS engagement partner at the time the financial statements which appear in the three prospectuses were examined by Arthur Andersen and with Mr. Allen Brodd, the partner of Arthur Andersen in charge of our Geneva office. Mr. Brodd advises me that to his knowledge he is the only representative of Arthur Andersen to have testified before the Swiss Court in a proceeding there pending against the IOS directors, which is evidently the one referred to in the Bjork affidavit; that he so testified on one occasion; and that at no time did he testify in the Swiss action to the effect that "the accounting work and other matters pertaining to the preparation of the prospectuses were done in New York." Mr. Brodd advised me that his testimony in the Swiss action as to the place where Arthur Andersen performed its examination of the IOS financial statements and expressed its opinions, which appear in the three prospectuses, reflected the true facts, as I have stated them herein. Mr. Tenz was also in agreement that the facts, as I have stated them herein, as to where Arthur Andersen did its work relative to IOS are accurate.

WHEREFORE, defendant Arthur Andersen respectfully requests that plaintiff's motion for an order that this action may be maintained as a class action be in all respects denied.

Sworn to before me this  
28 day of April, 1972

\_\_\_\_\_  
Notary Public

Walter W. Ruegger  
Walter W. Ruegger

MARJORY L. PEEPLES  
Notary Public, State of New York  
No. 31-3314055  
Certified in New York County  
Commission Expires March 30, 1974

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Notice of Motion of Investors Overseas Bank, Ltd. to Alter  
and Amend Conditional Class Action Determination

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

RECEIVED BY MAIL

NOV 1 1973

REFERRED TO

*M. R. P.*

-----x  
HOWARD BERSCH,

Plaintiff,

- against -

DREXEL FIRESTONE, INC., et al.,

Defendants.

NOTICE OF MOTION

-----x  
S I R S :

PLEASE TAKE NOTICE that, upon the pleadings, the affidavit of Bertram D. Coleman, sworn to on or about April 28, 1972; the affidavits of Walter W. Ruegger and Murray J. Howe, sworn to April 28, 1972; Kenneth L. Beaugrand, sworn to May 15, 1972; Charles Jolibois, sworn to October 25, 1973; Ercole Graziadei, sworn to November 27, 1972; John Godfray Le Quesne, sworn to September 28, 1973; Jan-Peter de Wall, sworn to October 1, 1973; and Peter Hafter, sworn to October 5, 1973; the depositions of Bertram Coleman (April 5, 1973), Grayson Murphy (May 2, 1973), Murray J. Howe (June 6, 1973), Hugh Knowlton, Jr. (June 19, 1973), Frederick M. Werblow (June 20, 1973), Wilbur S. Duncan (July 17, 1973) and Walter W. Ruegger (August 29, 1973); and all of the other papers and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Sylvester J. Ryan in Room 1106 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City, County and State of New York, on December 20, 1973 at 10:00 A.M., or as soon thereafter as counsel can be



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heard, for an order pursuant to Fed.R.Civ.P. 23(c)(1) directing that the conditional class determination by order of the Honorable Marvin E. Frankel on June 28, 1972 be altered and amended to provide that (1) the action may not be maintained as a class suit or, alternatively, that (2) foreign nationals who purchased outside the United States be excluded from the class.

Dated: New York, New York  
October 31, 1973

Yours, etc.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By \_\_\_\_\_  
Robert L. Laufer

Attorneys for Investors Overseas  
Bank Limited  
345 Park Avenue  
New York, N. Y. 10022  
(Tel.: 935-8000)

TO: SILVERMAN & HARNES  
Attorneys for Plaintiff  
One Rockefeller Plaza  
New York, N. Y. 10020

DAVIS POLK & WARDWELL  
Attorneys for Defendants  
Banque Rothschild and  
Smith, Barney & Co. Incorporated  
One Chase Manhattan Plaza  
New York, N. Y. 10005

SULLIVAN & CROMWELL  
Attorneys for Defendants  
Lexerd & Co., Inc. (formerly  
Drexel Firestone, Inc.),  
Hill Samuel & Co. Limited,  
Guinness Mahon & Co. Limited, and  
Pierson, Heldring & Pierson  
48 Wall Street  
New York, N. Y. 10005

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Messrs. BREED, ABBOTT & MORGAN  
Attorneys for Defendant  
Arthur Andersen & Co.  
One Chase Manhattan Plaza  
New York, N. Y. 10005

WILKIE FARR & GALLAGHER  
Attorneys for Defendant  
J. H. Drang & Co., Ltd.  
One Chase Manhattan Plaza  
New York, N. Y. 10005



110 A

Notice of Motion of Banque Rothschild and  
Smith Barney & Co., Inc. to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HOWARD BERSCH,

:

Plaintiff,

:

71 Civ. 5373  
(SJR)

-against-

:

DREXEL FIRESTONE, INC., et al.,

:

NOTICE OF MOTION

Defendants.

:

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S I R S :

PLEASE TAKE NOTICE that upon the affidavit of George P. Bischof, sworn to the 31st day of October, 1973, the affidavit of Jerome Istel sworn to the 23rd day of October, 1973, the affidavit of Ercole Graziadei, sworn to the 2nd day of November, 1972, the affidavit of Charles Jolibois, Jr. sworn to the 25th day of October, 1973, the affidavits and depositions upon which defendants Lexerd & Co., Inc. (formerly known as Drexel Firestone, Inc.), Hill Samuel & Co. Limited, Guinness Mahon & Co. Limited, and Pierson, Heldring & Pierson will move this Court on December 20, 1973, and upon all of the papers and proceedings heretofore had herein, defendants Banque Rothschild and Smith, Barney & Co. Incorporated will move this Court, Hon. Sylvester J. Ryan in Room 1106 of the United States Court House, Foley Square, New York, N.Y. 10007, on December 20, 1973, at 10:00 A.M., or as soon thereafter as counsel can be heard, for:

(1) an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the Complaint

against Defendants Banque Rothschild and Smith, Barney & Co. Incorporated for lack of jurisdiction over the subject matter, or, in the alternative

(2) an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure vacating the tentative ruling of this Court, Hon. Marvin E. Frankel, U.S.D.J., made on June 28, 1972 that the present action may be maintained as a class action, or modifying it to exclude persons who did not purchase Common Shares of I.O.S., Ltd. in the United States from the plaintiff class.

PLEASE TAKE FURTHER NOTICE that upon the affidavit of Jerome Istel, sworn to the 23rd day of October, 1973, defendant Banque Rothschild will further move this Court, Hon. Sylvester J. Ryan at the above named place and time for an order pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure dismissing the Complaint against it for lack of jurisdiction over the person of defendant Banque Rothschild.

Dated: New York, New York  
October 31, 1973

DAVIS POLK & WARDWELL

By *Henry L. King*  
A Member of the Firm

Attorneys for Defendants  
Banque Rothschild and  
Smith, Barney & Co.  
Incorporated  
1 Chase Manhattan Plaza  
New York, New York 10005  
Telephone: (212) HA 2-3400

TO: SILVERMAN & HARNES, ESQS.  
Attorneys for Plaintiff  
One Rockefeller Plaza  
New York, New York 10020



BREED ABBOTT & MORGAN, ESQS.  
Attorneys for Defendant  
Arthur Andersen & Co.  
One Chase Manhattan Plaza  
New York, New York 10005

SULLIVAN & CROMWELL, ESQS.  
Attorneys for Defendants  
Drexel Firestone, Inc., Pierson,  
Heldring & Pierson, Guinness  
Mahon & Co., Limited, and Hill  
Samuel & Co., Limited  
48 Wall Street  
New York, New York 10005

WILLKIE FARR & GALLAGHER, ESQS.  
Attorneys for Defendant  
J. H. Crang & Co., Ltd.  
One Chase Manhattan Plaza  
New York, New York 10005

PAUL WEISS RIFKIND WHARTON & GARRISON, ESQS.  
Attorneys for Defendant  
Investors Overseas Bank, Ltd.  
345 Park Avenue  
New York, New York 10022

**Affidavit of George P. Bischof in Support of  
Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

HOWARD BERSCH, :

Plaintiff, : 71 Civ. 5373  
(SJR)

-against- :

DREXEL FIRESTONE, INC., et al., : AFFIDAVIT

Defendants. :

----- x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

GEORGE P. BISCHOF, being duly sworn, says:

1. I am a Vice President (Corporate Finance) of defendant Smith, Barney & Co. Incorporated. I make this affidavit in support of the motion of defendant Smith, Barney & Co. Incorporated (1) to dismiss plaintiff's Complaint against defendant Smith, Barney & Co. Incorporated on the ground of lack of jurisdiction over the subject matter, and (2) to modify or vacate the tentative ruling of this Court, Honorable Marvin E. Frankel, U.S.D.J., made on June 28, 1972, that the present action may be maintained as a class action.

2. During 1969, I was a Vice President of Smith, Barney and was a resident in the Paris Office of Smith, Barney from April to July 1969. During the summer of 1969, I was designated by Smith, Barney to participate as a liaison with the Drexel Group representatives who were in Geneva preparing various documents relating to the offering. I am familiar with the facts and circumstances relating to Smith, Barney's participation as a representative of the under-



issued Common Shares of IOS in September 1969.

Smith, Barney Did Not Offer or Sell  
Any IOS Common Shares  
in the Drexel Group Offering  
in the United States or  
to any United States Persons

3. Section 3 of the Agreement Among Underwriters, signed by Smith, Barney as well as by all the other Drexel Group underwriters, required Smith, Barney not to offer or sell IOS Common Shares in the United States, Canada, or Mexico, to citizens or residents of the United States, to partnerships any of whose partners were United States citizens or residents, to corporations incorporated or having their principal place of business in the United States, or to corporations controlled by any such United States persons, partnerships, or corporations. A copy of the Agreement Among Underwriters signed by Smith, Barney is annexed as Exhibit A.

4. Section 3 of the Agreement Among Underwriters likewise provided that no shares could be delivered at the closing of the Drexel Group offering except to underwriters and dealers who had executed certificates attesting their compliance with these restrictions on the offering and sale of IOS Common Shares. At the closing, Smith, Barney delivered the certificate called for by Section 3 of the Agreement Among Underwriters, and a similar certificate was delivered by each of the securities dealers to whom Smith, Barney sold IOS Common Shares. A copy of the certificate executed and delivered by Smith, Barney is annexed as Exhibit B.

5. By an internal Smith, Barney "All Office Memorandum", dated September 8, 1969 and signed by me, annexed

as Exhibit C, Smith, Barney instructed its personnel to comply with the restrictions on the offering and sale of IOS Common Shares. In this memorandum I stated that it was "absolutely essential" that Smith, Barney "strictly observe the prohibitions on offerings and sales which are set forth in the Underwriting Agreement and the Agreement Among Underwriters." In a further memorandum dated September 9, 1969, addressed to the Officers, Managers and Registered Representatives of Smith, Barney, annexed as Exhibit D, Hugh Knowlton, Jr., then President, Chief Executive Officer, and a Director of Smith, Barney emphasized that it was "of the utmost importance" that recipients of his memorandum "read the [September 8, 1969] All Office Memorandum carefully and note the restrictions relating to accounts which [would] be eligible to purchase shares." To the best of my knowledge and belief, all the restrictions contained in the Underwriting Agreement were strictly observed and complied with.\* In particular, to the best of my knowledge and belief no preliminary prospectuses or prospectuses were delivered to any person in the United States, and no offers were made in any other form to any person in the United States. A few unsolicited offers to purchase were received by Smith, Barney in the United States; those which came from

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\* Smith, Barney sold 500 IOS Common Shares to Banco de Comercio, S.A. of Mexico City, but this sale was made by telex from Smith, Barney's office in Paris, and Banco de Comercio certified that all 500 shares had been resold to one retail purchaser, which was not a United States person, partnership or corporation. Smith, Barney also sold 1,000 IOS Common Shares to the Paris Branch of Morgan Guaranty Trust Company, after Morgan Guaranty's Paris office had certified that the shares had been resold to a purchaser which was not a United States person, partnership or corporation.



persons outside the United States to whom sales could be made, under the terms of the Agreement Among Underwriters were referred to Smith, Barney's Paris Office for consideration, and any offers to sell and sales made by Smith, Barney to any such persons took place entirely outside the United States.

6. As demonstrated by the certificate executed and delivered by Smith, Barney, annexed as Exhibit B, of the 330,000 IOS Common Shares allotted to it, Smith, Barney sold 30,400 IOS Common Shares to a total of 16 retail purchasers outside the United States, none of whom was a United States person, partnership, or corporation, as defined in paragraph 3 above. Although not required to do so by the Agreement Among Underwriters, Smith, Barney required its retail purchasers to certify that they had not purchased their shares as nominee, agent or otherwise on behalf of a "United States person", or an "IOS person", as defined in the retail certificate. A form of the certificate executed by retail purchasers is annexed as Exhibit E. The remaining 299,600 IOS Common Shares allotted to Smith, Barney were resold to a total of 119 underwriters, selected dealers and other recognized securities dealers outside the United States. Each such underwriter and dealer certified that it had not sold to any United States person, partnership, or corporation, as defined in paragraph 3.

7. To the best of my knowledge and belief, each other underwriter and dealer who took part in the Drexel Group offering adhered to the restrictions on the

offering and sale of IOS Common Shares set forth in paragraph 3 above. Moreover, although the Drexel Group was not involved in the secondary offerings of IOS Common Shares made in September 1969 by a Canadian banking group headed by J. H. Crang & Co., Ltd. and Investors Overseas Bank Limited, Smith, Barney understood from IOS and from other members of the Drexel Group that similar restrictions would be observed in those offerings to prevent any offering or sale of IOS Common Shares in the United States.

Smith, Barney Performed No  
Significant Activities in the  
United States in Connection With  
the Drexel Group Offering

8. In May 1969, while resident in Smith, Barney's Paris office, I had a meeting with IOS representatives in Geneva to discuss IOS's business and plans for the Drexel Group offering. Subsequently, while I was in Paris, I had several follow-up communications with representatives of IOS, regarding the progress of the Drexel Group negotiations. In connection with the follow-up, I prepared brief internal memoranda which were circulated to various Smith, Barney personnel, including some in New York.

9. Shortly after my return in July 1969 to New York following my residency in Smith, Barney's Paris office, I was requested to go to Geneva to participate as a liaison with the Drexel Group representatives who were in Geneva preparing the various documents relating to the offering. I spent most of the latter part of July, August and part of September in Europe on matters relating to the Drexel



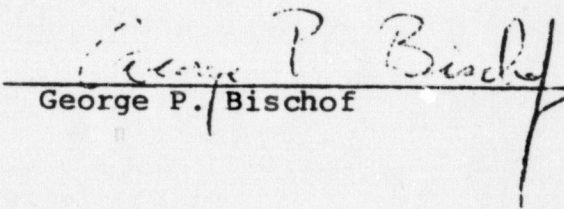
Group offering. I attended various meetings in Geneva with Drexel Group representatives relating to the preparation of the offering documents and syndication of the Drexel Group offering, and represented Smith, Barney at discussions with IOS in Geneva regarding aspects of the Drexel Group offering. From time to time, I consulted with Mr. Knowlton or other Smith, Barney personnel in the New York office, concerning the Drexel Group offering. However, all of Smith, Barney's significant activities in connection with the Drexel Group offering were performed outside of the United States.

10. In addition to me, several other Smith, Barney personnel attended meetings in Europe with representatives of the Drexel Group and from Europe generally followed the progress of the Drexel Group offering. While I was in Smith, Barney's New York office during part of September, I acted as liaison with the Paris Office with respect to any questions relating to the sales restrictions involved in the offering.

11. All sales transactions were made in Europe. All offers to purchase shares were referred to Smith, Barney's Paris office. The allocation of IOS Common Shares sold by Smith, Barney in the Drexel Group offering was made in Paris after consultation with the Smith, Barney sales personnel in Europe and New York. Confirmations of sales were prepared and mailed from Smith, Barney's office in Paris. The closing for the Drexel Group offering was held in London. The IOS Common Shares were delivered to the co-managers in London. Shares sold by Smith, Barney to its clients and customers were made available for delivery to

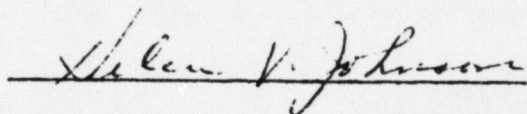
the purchasers at the Chemical Bank New York Trust Company office in London. Payment for these shares was due free of delivery, value October 14, 1969, at the New York headquarters office of Chemical Bank, for the account of the London Chemical Bank office. Smith, Barney did not permit payment to be made through any accounts maintained with Smith, Barney in New York.

WHEREFORE, defendant Smith, Barney & Co. Incorporated respectfully requests that this Court enter an order (1) dismissing plaintiff's Complaint against defendant Smith, Barney on the ground of lack of jurisdiction over the subject matter, and (2) modifying the tentative ruling of this Court, Honorable Marvin E. Frankel, U.S.D.J., made on June 28, 1972, that the present action may be maintained as a class action.

  
George P. Bischof

Sworn to before me this

31st day of October, 1973.



HELEN V. JOHNSON  
Notary Public, State of New York  
No. 03 7097425  
Qualified in Bronx County  
Certificate filed in New York County  
Commission Expires March 30, 1974



**Affidavit of Jerome Istel in Support of  
Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HOWARD BERSCH,	:	
Plaintiff,	:	
	:	
- against -	:	71 Civ. 5373
	:	(SJR)
DREXEL FIRESTONE, INC., et al.,	:	
Defendants.	:	<u>AFFIDAVIT</u>

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REPUBLIC OF FRANCE, CITY OF PARIS	)	
	:	ss.:
EMBASSY OF THE UNITED STATES OF AMERICA	)	

JEROME ISTEL, being duly sworn, says :

1. I am a directeur (manager) of defendant Banque Rothschild. I make this affidavit in support of the motion of defendant Banque Rothschild (1) to dismiss plaintiff's Complaint against defendant Banque Rothschild on the grounds of lack of jurisdiction over the subject matter and lack of jurisdiction over the person of defendant Banque Rothschild, and (2) to vacate the tentative ruling of this Court, Honorable Marvin E. Frankel, U.S.D.J., made on June 28, 1972, that the present action may be maintained as a class action.

2. During 1969 I had operational responsibility for the underwriting of international securities issues by Banque Rothschild. Accordingly, I am familiar with the facts and circumstances relating to Banque Rothschild's participation as a representative of the underwriters in the Drexel Group offering of 5,600,000 newly issued Common Shares of I.O.S., Ltd. in September 1969. As a manager of Banque Rothschild, I am also generally familiar with the personal and institutional banking and investment activities of Banque Rothschild in areas other than the underwriting of securities issues.

Banque Rothschild Does Not  
Transact Any Business in  
the United States

3. Banque Rothschild is a bank organized as a société anonyme (corporation) under the laws of the Republic of France, with its siège social (principal place of business) in Paris. Banque Rothschild does not maintain any branch or office outside the Republic of France. Banque Rothschild is not licensed to conduct a banking business in any country outside the Republic of France, and it does not do so. In particular, Banque Rothschild neither maintains an office nor conducts a banking business in the United States. Moreover, Banque Rothschild has no affiliated or subsidiary corporation which does business in the United States.\*

4. From time to time, Banque Rothschild has arranged for the execution of transactions in securities of United States corporations on behalf of institutional and individual clients of Banque Rothschild who are non-residents of the United States. The total volume of these transactions has not been large ; there were 7,249 such transactions during the two years and three months from October 1, 1969 to December 31, 1971. From time to time, Banque Rothschild has also participated as a European underwriter in offerings of securities of United States corporations. Most of these transactions involved common stocks traded on stock exchanges or in the over-the-counter market in the United States. These transactions have not entailed the performance of any activities by Banque Rothschild within the United States. Banque Rothschild's participation in these transactions has been effected by telephone, telex, or correspondence from its offices in Paris.

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\* Individuals who might be deemed to control Banque Rothschild also hold indirect minority interests in New Court Securities Corporation, a private investment banking firm in New York, New York. However, Banque Rothschild is not in a position to, and does not, exercise control over the activities of New Court Securities Corporation.



5. Banque Rothschild has also from time to time arranged for the execution of a very limited number of securities transactions on behalf of clients resident in the United States. Again, Banque Rothschild's activities in connection with these transactions have been performed entirely outside the United States. The total volume of such transactions has been extremely small. There were no such transactions during the last four months of 1969, the period embracing the Drexel Group offering of IOS Common Shares; 14 such transactions during the whole of 1970; and 32 during 1971.

6. None of the transactions described in paragraphs 4 and 5 involved IOS Common Shares, or related in any way to the Drexel Group offering of IOS Common Shares in September 1969.

Banque Rothschild Performed  
No Activities in the United  
States in Connection With the  
Drexel Group Offering

7. Banque Rothschild was invited to become a representative of the underwriters of the Drexel Group offering in the course of discussions held in Paris, and Banque Rothschild's activities as a representative of the underwriters were conducted wholly in Europe. Representatives of Banque Rothschild attended conferences with representatives of I.O.S., Ltd. and the other representatives of the underwriters in the Drexel Group offering in Switzerland, France, and Great Britain. Banque Rothschild's allotment and resale of the 330,000 IOS Common Shares allotted to it in the Drexel Group offering were conducted from its offices in Paris.

8. Section 3 of the Agreement Among Underwriters, signed by Banque Rothschild as well as by all the other Drexel Group underwriters, required Banque Rothschild not to offer or sell IOS Common Shares in the United States, Canada, or Mexico, to citizens or residents of the United States, to partnerships any of whose partners were United

States citizens or residents, to corporations incorporated or having their principal place of business in the United States, or to corporations controlled by any such United States persons, partnerships, or corporations. Section 3 of the Agreement Among Underwriters likewise provided that no shares could be delivered at the closing of the Drexel Group offering except to underwriters and dealers who had executed certificates attesting their compliance with these restrictions on the offering and sale of IOS Common Shares. Banque Rothschild delivered such a certificate at the closing, and a similar certificate was delivered by each of the 43 securities dealers to whom Banque Rothschild sold IOS Common Shares.

9. Of the 330,000 IOS Common Shares allotted to Banque Rothschild in the Drexel Group offering, 194,050 were purchased for the account of individual and institutional clients of Banque Rothschild, none of whom was a United States person, partnership, or corporation, as defined in paragraph 8 above. The remaining 135,950 IOS Common Shares were resold to various individuals, securities dealers, and institutions, mostly in France, Switzerland, and Italy. Again, none of these purchasers was a United States person, partnership, or corporation, as defined in paragraph 8.\* Banque Rothschild made no offer to sell IOS Common Shares in the United States, Canada, or Mexico, or to any United States person, partnership, or corporation.

10. To the best of Banque Rothschild's knowledge and belief, each other underwriter and dealer who took part in the Drexel Group offering adhered to the restrictions on the offering and sale of IOS Common Shares set forth in

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\* 3,000 IOS Common Shares were purchased by Dow Bank A.G. of Zurich, 1,000 by the Paris office of Morgan Guaranty Trust Company of New York, and 500 by the Zurich office of Morgan Guaranty Trust Company of New York. However, the 3,000 IOS Common Shares purchased by Dow Bank A.G. were resold to 21 retail purchasers, and Dow Bank A.G. certified that none of the retail purchasers was a United States person, partnership, or corporation. In the case of the shares purchased by Morgan Guaranty's Paris and Zurich offices, Banque Rothschild was satisfied after inquiry that the purchases were made for the account of clients of Morgan Guaranty who were not United States persons, partnerships, or corporations.



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paragraph 8 above. Moreover, although Banque Rothschild was not familiar with the proposed terms of the secondary offerings of IOS Common Shares made in September 1969 by a Canadian banking group headed by J.H. Crang & Co., Ltd. and Investors Overseas Bank Limited, Banque Rothschild understood from IOS and from other members of the Drexel Group that similar restrictions would be observed in those offerings to prevent any offering or sale of IOS Common Shares in the United States.

WHEREFORE defendant Banque Rothschild respectfully requests that this Court enter an order (i) dismissing plaintiff's Complaint against defendant Banque Rothschild on the grounds of lack of jurisdiction over the subject matter and lack of jurisdiction over the person of defendant Banque Rothschild, and (2) vacating the tentative ruling of this Court, Honorable Marvin E. Frankel, U.S.D.J., made on June 28, 1972, that the present action may be maintained as a class action.

*Jerome T. Stel*

Sworn to before me this  
25 day of October, 1973.

*Carol B. Reavis*

Carol B. REAVIS  
Vice-Consul

**Affidavit of Ercole Graziadei in Support of  
Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HOWARD BERSCH,	:	
Plaintiff	:	71 Civ. 5073
-against-	:	(SJR)
	:	AFFIDAVIT
DREXEL FIRESTONE, INC., et al.,	:	
Defendants	:	
----- x		

REPUBLIC OF ITALY, CITY OF ROME	)	
	:	ss.:
EMBASSY OF THE UNITED STATES OF AMERICA	)	

ERCOLE GRAZIADEI, being duly sworn, says:

1. I am the founder and the senior member of the law firm Studio dell'Avv. Ercole Graziadei of Rome and Milan, Republic of Italy. I have been a practising advocate (avvocato) in the civil courts of Italy since 1924, and I have been a member of the Bar of Italy's highest court, the Corte di Cassazione, since 1934. I make this affidavit in order to furnish the Court with my opinion regarding the effect which an Italian Court would give to a judgment on the merits adverse to the plaintiff class in this action, if a member of the plaintiff class were subsequently to commence an action in Italy against one or more of the defendants in this action.



2. I have studied the Complaint in this action.

I am of the opinion that under Italian law a non-representative member of the plaintiff class in this action would not be bound by an adverse judgment of this Court, and that he would be able to sue the same defendants again on a similar cause of action in an Italian Court (assuming jurisdictional requirements are met) at least until 1975 and perhaps for many years thereafter. Moreover, I am convinced that even if the said non-representative class member had affirmatively opted into the plaintiff class in this action and had in writing agreed to be bound by the judgment of this Court, a judgment of this Court adverse to the plaintiff class on the merits would not be accorded recognition in Italy and would not prevent the non-representative class member from maintaining a subsequent suit in an Italian Court on the same cause of action against the same defendants.

\* \* \* \* \*

3. ACTIONS MAINTAINABLE UNDER ITALIAN LAW

- (a) Italian law makes a clear distinction between actio ex contractu and actio ex delicto (or ex lege Aquilia).

Actio ex contractu is the action lying between parties to a contractual relationship.

Actio ex delicto (the action in tort) is granted to any person who has suffered unjustified damages in consequence of an act committed by intention (dolus) or by negligence (culpa) by another person in the absence of a contractual relationship.

- (b) The nearest equivalents to the Bersch action which could be pursued under Italian law by a purchaser of I.O.S. securities are:

- (i) an action for annulment of the contract and damages pursuant to Article 1439 of the Civil Code (actio ex contractu)<sup>(1)</sup> against the Vendors of the I.O.S. securities;

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(1) An English translation of Article 1439 of the Civil Code reads as follows:

"Fraud is cause for the annulment of the contract  
 "when the deception employed by one of the contracting parties was such that, without it, the  
 "other contracting party would not have entered  
 "into the contract.

"When the deception was employed by a third person,  
 "the contract is voidable if it was known to the  
 "party who derived benefit from it."



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- (ii) an action for damages pursuant to Article 2043 of the Civil Code (actio ex delicto)<sup>(1)</sup> against any third party who may have participated in the deception but who was not a party to the sale agreement of the I.O.S. securities.
- (c) The allegations set forth in the Complaint, if true, and if Italian law were applicable, would support an action in an Italian Court under Article 1439 C.C. against the defendants who directly sold the I.O.S. securities to the plaintiff (i.e. against the underwriters) and an action under Article 2043 C.C. against the defendants who were not parties of the sale agreement of the I.O.S. securities (e.g. the chartered accountants) provided that:
- (i) Prescription has not expired;
  - (ii) Jurisdictional requirements are met;
  - (iii) Action is not barred by res iudicata.

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(1) An English translation of Article 2043 C.C. reads as follows:

"Any fraudulent, malicious, or negligent act that  
"causes an unjustified injury to another obliges  
"the person who has committed the act to pay  
"damages."

4. APPLICABLE LAW

- (a) The rules on applicable law are set forth in Article 25 of the Provision of Law in General, an English translation of which reads as follows:

"Obligations arising from contract are governed  
 "by the national law of the contracting parties,  
 "if common to them; otherwise by that of the  
 "place in which the contract was made. In any  
 "case a different intention of the parties  
 "controls.

"Non-contractual obligations /i.e. deriving from  
 "tortious acts/ are governed by the law of the  
 "place where the facts from which they arise took  
 "place."

- (b) In the present case, if the plaintiff alleges the violation of contractual duties (i.e. brings an actio ex contractu) the first paragraph of Article 25 applies. Hence the Italian substantive law will be applicable only if the contract of sale of I.O.S. securities under which an action is brought has been entered into in Italy, because no defendant is Italian and we are not aware of a choice of Italian law having been made in such contracts of sale. If Italian law is not applicable an Italian Court having jurisdiction (see para. 6 below) would adjudge the case in accordance with such other substantive law as is applicable pursuant to the provisions of the said Article 25.



If the plaintiff alleges to have suffered damages from a tortious act such as, in this case, the alleged misrepresentations by the auditors (i.e. brings an actio ex delicto) it is necessary to ascertain where the tortious act was committed in order to determine the applicable law. The most authoritative legal authors<sup>(1)</sup> and some judgments of the Court of Cassation<sup>(2)</sup> consider the tortious act to have been committed at the moment and place where its damaging effect has occurred (the principle being that a mere unlawful conduct is not relevant in civil law until it causes damages, so that the unlawful act is considered "completed" or "performed" only if and where its damaging effects materialise). It is clear that, in the present case, the damaging effects of the alleged tortious act arise from the conclusion of the contract of sale of I.C.S. securities and therefore the place of such conclusion would determine the applicable substantive law also in respect of the tortious act and of the actions grounded thereon.

(1) BALLADORE PALLIERI in Diritto Internazionale Privato, Milano 1950, page 253.

(2) COURT OF CASSATION, 27th February 1962, No. 363.

5. PRESCRIPTION

- (a) For the action under Article 1439 C.C. the applicable period of prescription is 5 years (see Article 1442 C.C.)<sup>(1)</sup> beginning from the date of conclusion of contract unless the deceived party proves that it has discovered the deception at a later date.<sup>(2)</sup>
- (b) For the action under art. 2043 C.C. the applicable period of prescription is also 5 years (see Article 2947 C.C.)<sup>(3)</sup> beginning from the date in which the injurious event occurs: namely, in this case, (see para. 4(b) above) the time of the conclusion of the contract under which the securities were sold on the basis of the alleged misleading and false prospectus.

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(1) An English translation of the relevant part of Article 1442 C. reads as follows:

"The action for annulment of a contract is prescribed  
 "in five years. When voidability depends on a defect  
 "in consent the time runs from the date on which ....  
 "the fraud was discovered /omissis/."

(2) COURT OF CASSATION, 12th February 1954, No. 354.

(3) An English translation of Article 2947 reads as follows:

"The right to compensation for damages arising from  
 "unlawful /tortious/ acts is prescribed in five years  
 "from the date on which the act occurred."



- (c) Prescription may be interrupted, pursuant to the provisions of Article 2943 C.C.<sup>(1)</sup> by an appropriate act performed by the holder of the right and directed to the obligee to the effect that the former intends to exercise his right against the latter.

The only formal requirements for a valid act of interruption are that such act be in writing (a simple letter or any other written document originating from the holder of the right and demanding the performance of the obligation is sufficient to interrupt the prescription), and that it be communicated or notified to or in any way acknowledged by the obligee.<sup>(2)</sup> It should be noted that under Italian law the application of the prescription provisions is not mandatory, and the Court may only apply them if defendant expressly relies thereon (Article 2438 C.C.).

- (d) In the present case, the positive act by which a class member "opts-in", in the proceedings pending before the U.S. Federal Court would be a valid act of interruption of the prescription if, as must be assumed, the defendants have knowledge of the act by which non-representative class members opt in.

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(1) An English translation of art. 2943 C.C. reads as follows:

"Prescription is interrupted by service of the paper  
"by which judicial proceedings are commenced, whether  
"on the merits or for conservation or enforcement.

"It is also interrupted by actions instituted in the  
"course of judicial proceedings.

"Interruption is effective even if the judge to whom  
"the action is submitted lacks jurisdiction. Pre-  
"scription is also interrupted by any other act capable  
"of placing the debtor on notice or on default."

(2) See: COURT OF CASSATION, 31st May 1945, No. 400 and 19th October 1954, No. 3887.

- (e) The effect of an act of interruption is that the five-year term of the statute of limitations referred to above commences to run afresh from the date of the act of interruption.

The prescription can be interrupted an indefinite number of times by the performance of additional acts of interruption and each act has the above-mentioned effect.<sup>(1)</sup>

#### 6. JURISDICTIONAL REQUIREMENTS

- (a) Pursuant to Article 4 of the Code of Civil Procedure the jurisdiction of an Italian Court is unaffected by the nationality, domicile or residence of the plaintiff and exists whenever any of the following conditions is met:
- (i) the defendant is a resident of or domiciled in Italy or has a representative in Italy specifically authorised to represent him before Italian courts or has accepted Italian jurisdiction;
  - (ii) the action relates to contractual obligations which arose or were to be performed in Italy or from tortious acts which were committed in Italy;

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(1) MAGAZZU in Novissimo Digesto Italiano, Torino, 1960 sotto voce "Decadenza - Diritto Civile".

FERRUCCI in Commentario del Codice Civile, Torino, 1964, page 376.



(iii) the action is "connected" with an action already pending before an Italian Court, i.e. either the subject matter of the action is connected with the subject matter of an action already pending before an Italian Court or the parties to the action are identical with those of an action already pending before an Italian Court.

(iv) in the event of a non-Italian defendant in cases other than those set out above, if, in the reciprocal case, the Courts of the State of which the non-Italian defendant is a national would have jurisdiction over an Italian national.

(b) Applying the test of Article 4 of the Code of Civil Procedure to the facts alleged in the Complaint, it is clear that an Italian Court would exercise jurisdiction over the actions brought against any defendant named in the Complaint provided that the plaintiff

(i) had entered into the purchase agreement of the I.O.S. securities in Italy, or

(ii) had received delivery of the I.O.S. securities or paid the price thereof in Italy.

7. RECOGNITION OF A U.S. COURT'S JUDGMENT IN GENERAL

(a) Foreign judgments have no legal effect within Italy unless they are accorded recognition (exequatur) by the appropriate Italian Court: the only legal effect in Italy of a foreign res iudicata is to entitle the parties to ask for the exequatur of the foreign judgment. (1)

(b) The Italian Code of Civil Procedure provides for two kinds of exequatur proceedings:

(i) the principal exequatur governed by Article 796 Code of Civil Procedure; (2)

(ii) the exequatur incidenter tantum governed by Article 799 Code of Civil Procedure. (3)

(1) MORELLI in Diritto Processuale Civile Internazionale, Padova 1954, page 283 ss.;

ANDRIOLI in Commento al Codice di Procedura Civile, Napoli 1964, sotto "articolo 796."

COURT OF CASSATION: 15th February 1949, No. 249 and 15th November 1954, No. 4456.

(2) An English translation of the relevant part of Article 796 of the Code of Civil Procedure reads as follows:

"Whoever wants to give effect in the State /Italy/ to  
"a foreign judgment must apply for exequatur proceedings  
"by summons /to be served on the parties against whom  
"exequatur is being sought/ before the Court of Appeals  
"of the place in which the judgment must be enforced."

(3) An English translation of the relevant part of Article 799 of the Code of Civil Procedure reads as follows:

"The efficacy of the foreign judgment can be declared  
"also in pending proceedings provided that the judge  
"of the pending proceedings ascertains that the  
"requirements set forth in Article 797 are met."



The main difference between principal exequatur and exequatur incidenter tantum is the following:

- (i) principal exequatur of a foreign judgment is granted by the Court of Appeals in autonomous proceedings whose sole and final object is the recognition of the foreign judgment. (If exequatur is granted the foreign res iudicata acquires the full effects of an Italian res iudicata, i.e. one resulting from ordinary Italian judicial proceedings.);
- (ii) the exequatur incidenter tantum is a particular form of exequatur which is granted by any Italian Court in judicial proceedings pending before it upon request of one of the parties of the proceedings who wants to avail himself of the foreign res iudicata for the purpose of the pending proceedings. (If exequatur is granted the foreign judgment has the effect of an Italian res iudicata only in that particular pending proceeding.)

It should be pointed out that, in the present case, if the U.S. Court gives a judgment on the merits adverse to the plaintiff's class it would be extremely difficult and expensive for the defendant to obtain a principal exequatur against the plaintiff class members, because (a) the rules of Italian procedure would oblige the defendants to individually sue before the Court of Appeals all the class members even if they are domiciled abroad, (b) the Court of Appeals may deny action for principal exequatur because of the lack of interest to exequatur of the defendants since their interest would be only to bar

a new action, while at that time no member of the plaintiff class had threatened their right.

Therefore the likelihood in this case is that, even if the defendants obtain a victory in the U.S. proceedings, they will be able to apply only for an incidenter exequatur of the U.S. Court judgment if and when a plaintiff brings a new action against them for the same cause.

- (c) As to the requirements for granting an exequatur, Article 797 of the Italian Code of Civil Procedure defines the conditions which must be met if the foreign judgment is to be accorded recognition.<sup>(1)</sup> An English translation of the relevant portion of Article 797 reads as follows:

"The Court of Appeals (corte d'appello) adjudges  
"the efficacy of a foreign judgment within the  
"State [Italy] when it determines:

"(1) that the foreign Court by which the judgment  
"was rendered had the authority to take cognizance  
"of the matter in accordance with the jurisdiction-  
"al principles prevailing in Italy;

"(2) that the original summons was served in com-  
"pliance with the rules on service of process  
"prevailing in the country where the action was  
"instituted, and that the defendant was allowed  
"an adequate time limit to enter an appearance;

"(3) that the parties entered their respective  
"appearances according to local law, or the  
"absence of the defendant was duly determined  
"and declared pursuant to said law;

"(4) that the judgment has become res iudicata  
"/i.e. is no longer susceptible of being appealed/  
"under the law of the place where it was rendered;

"(5) that the judgment is not in conflict with  
"another judgment rendered by an Italian Court;

(1) These conditions govern both the principal and the incidenter tantum exequatur since Article 799 C.P.C. expressly refers to the conditions set forth in Article 797 C.P.C.



"(6) that an action, instituted prior to the  
 "foreign judgment becoming final , is not  
 "pending in an Italian Court over the same  
 "matter and between the same parties;

"(7) that the judgment contains no provisions  
 "which are contrary to Italian public policy."

- (d) The event of non-appearance of a defendant in the foreign proceedings gives rise to the particular consequence provided for in Article 798 of the Code of Civil Procedure pursuant to which the non-appearing party against whom the exequatur of a foreign judgment is being sought is entitled to a review of the merits of said judgment by the Court of Appeals. An English translation of Article 798 of the Code of Civil Procedure reads as follows:

"Upon request of the defendant the Court of  
 "Appeals reviews the merits of the suit when  
 "the judgment is pronounced in absence of the  
 "party ....."

The practical consequence of the above is that the foreign judgment is thus set aside so that in effect the simple exequatur procedure is no longer available and the action must be fought again on its merits.

Particular attention is drawn to the fact that the term "defendant" in said Article is referred to the defendant in the exequatur proceedings (i.e. the party against whom the exequatur of the foreign judgment is being sought) while it is not relevant if such defendant in the exequatur proceedings had the role of plaintiff or defendant in the foreign action. (1)

(1) MORELLI in Diritto Processuale Civile Internazionale, Padova, 1954, page 336.

COURT OF APPEALS OF MILAN, 1st February 1927 (published by Temi Lombarda 1927, page 389).

- (c) Class actions are not contemplated by Italian law. On the contrary it is a basic principle of the Italian civil procedure that no-one may exercise in an action a right of others (unless this is specifically contemplated by the law or authorised by the holder of the right). This principle is set forth expressly in Article 81 of the Code of Civil Procedure which reads as follows:

"Except insofar as is expressly provided by law,  
"no-one may in his own name exercise in an action  
"a right of others",

and finds confirmation in a number of provisions of Italian law. Article 24 Constitution: "everyone can promote action to defend his own rights" and "everyone has the right to defence in any state and degree of the proceedings"; Article 2907 C.C.: "the Courts provide for the defence of the rights upon request of the party and in the cases prescribed by the law, upon request of the Public Prosecutor or ex officio"; Article 100 Code of Civil Procedure: "in order to promote an action and to oppose it, it is necessary to have an interest".<sup>(1)</sup>

The principle is therefore that no person can institute or conduct judicial proceedings on behalf of others. Only limited and specific exceptions to this principle are found in Italian law, none of which is even remotely related to the case under review.

<sup>(1)</sup> LJEDMAN, one of the most authoritative legal authors in civil procedure, explains the meaning of Article 100 as follows (quoted from Manuale di Diritto Processuale Civile, I, Milano, 1957, page 42:

"When art. 100 C.P.C. sets forth that "in order to promote an action it is necessary to have an interest" it "clearly means that the interest to promote the action "not only must exist but must be an interest of the person who promotes the action: a third party cannot "validly enforce an interest to promote an action of "another person.

"The basic and obvious principle that only the holder "of a right is entitled to exercise it, is valid also "in respect of the action".



3. RECOGNITION OF THIS U.S. COURT'S JUDGMENT IN PARTICULAR

- (a) Applying the above principles to the present case it seems clear that the U.S. Federal Court judgment can have no effect in Italy unless and until it is accorded an exequatur by the Italian Court.
- (b) The U.S. Federal Court judgment, in my view, will not be recognized by an Italian Court on a number of grounds, each of which would per se be sufficient, as set forth herebelow:

(i) Article 797, No. 3 and 7

It is my understanding that pursuant to Rule 23 of the Federal Rules of Civil Procedures in a class action the class members (even those who opted-in) have not the full rights of a party but their powers are severely limited in many respects, such as in their rights to choose own counsel, to actively participate in the proceedings and to appeal. On these grounds, the Italian Court would in my firm view consider the requirement set forth by No. 3 of Article 797, not to be met, in that the non-representative class members are not in fact "parties" to the class action in the Italian legal concept.

Along similar lines, the conditions of Article 796, No. 7 would not be met on the grounds that the constitutional principle set forth by Article 24 of the Italian Constitution provides that "everyone has the right to defence at any point of the proceedings". This principle would be

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violated by the limited rights afforded to the non-representative class members.

Accordingly, the U.S. judgment would in this respect be against Italian public policy.

(ii) Article 727, No. 2

The requirements of No. 2 of Article 797 of the Code of Civil Procedure are not met with respect to a non-representative class member by any of the following forms of notice: newspaper publication; notice mailed directly to him which informed him that he would be included in the class unless he opted-out; notice mailed directly to him which informed him that he would be excluded from the class unless he affirmatively opted-in, as none of them can be regarded as a summons of the party receiving the notice in the sense that this concept is understood in Italian law, beset as it is by the Roman Law notion of a formal vocatio in ius.

(iii) Article 796, No. 6

A U.S. Court's judgment could not be recognized if a non-representative class member (even if he had opted-in) instituted an action in Italy before the U.S. judgment had become res iudicata in the United States.



To fully understand this rule it must be noted that, except to the extent that international treaties to which Italy is a party provide otherwise, different States are regarded by Italian law as sovereign and independent of each other from the jurisdictional point of view; in application of this principle the jurisdictional acts of foreign States have no legal effects within Italy except for foreign judgments which have become res iudicata and which are accorded recognition by the appropriate Italian Court through the exequatur proceedings described under paragraph 7 above. Thus the theory of lis pendens (which bars the pursuit of an action where the same action is pending before another judge) is applicable only domestically and not with respect to actions which may be pending outside the Italian jurisdiction.<sup>(1)</sup>

In conclusion a class member may institute in Italy an action against the defendants in spite of the fact that an identical action is pending before the U.S. Federal Court. Furthermore, if such an action is instituted in Italy before the U.S. Federal Court judgment becomes res iudicata (i.e. without possibility of being appealed) this judgment cannot be recognized in Italy.

(1) This principle is expressly set forth by Article 3 of the Code of Civil Procedure, whose English translation reads as follows:

"Article 3 - Pending action before a foreign jurisdiction. The Italian jurisdiction is not excluded by the fact that an identical action or a "connected" action /see para. 6 (a)(iii) above/ is pending before a foreign judge."

(iv) Article 798 C.P.C.

Additionally, non-representative class members, who did not enter an appearance in the foreign action, are entitled to demand the review of the merits of the action (see para. 7(d) above).

9. CONCLUSIONS

In summary my conclusions of law are the following:

- (a) The facts alleged in the Complaint, if true, would support an action under Article 1439 C.C. for annulment of the agreement and damages against the Vendors and an action under Article 2043 C.C. for damages against any party who may have participated in the deception without being a party to the contract of sale of the I.O.S. securities;
- (b) An Italian Court would have jurisdiction over such actions if the defendant is resident or domiciled in Italy or has in Italy a legal representative authorized to represent him before an Italian Court or if the agreement was entered into in Italy or if the shares were delivered or payment of the price thereof was made in Italy;
- (c) The period of prescription of such actions is five years running from the date of conclusion of the agreement (saving particular cases in which prescription may run from a later date) and such period of prescription may be interrupted an undefined number of times by a purchaser of the shares simply by communicating in writing to the obligee his intention to enforce his rights;



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- (d) Regardless of the form of notice sent to the "class member" and regardless of whether he had affirmatively opted into the plaintiff class in this action and had agreed in writing to be bound by the judgment of this Court, a judgment of this Court adverse to the plaintiff class would not be accorded recognition in Italy basically because of the limited powers of a non-representative class member, and therefore would not bar a subsequent action by the class member against the defendants named in the Complaint.

Abelrazed

(Brooke Graciadol)

Republic of Italy  
Province of Rome  
City of Rome  
Embassy of the United States of America

} ss:

Subscribed and sworn to before me, Phillip V. Battaglia  
Vice Consul of the United States of America at Rome, Italy duly  
commissioned and qualified, this 27th day of November, 1972.

Phillip V. Battaglia  
Vice Consul of the United States  
of America

**Affidavit of Charles Jolibois in Support of  
Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
HOWARD BERSCH, :  
 :  
Plaintiff, : 71 Civ. 5373  
- against - : (SJR)  
DREXEL FIRESTONE, Inc., et al., :  
Defendants. : AFFIDAVIT  
-----x

REPUBLIC OF FRANCE, CITY OF PARIS }  
EMBASSY OF THE UNITED STATES OF AMERICA } ss.:

CHARLES JOLIBOIS, being duly sworn, says:

1. I am an advocate (avocat) admitted to practice before the Court of Appeals (Cour d'Appel) of Paris, Republic of France. I was first admitted to practice in 1953, and I have practiced extensively in both civil and commercial courts in the Republic of France. I am a member of the firm of Brossollet, Ader, Jolibois & Nouel, 26 Boulevard Raspail, Paris 7ème, France. I make this affidavit in order to furnish the Court my opinion regarding the effect which the French courts would give to a judgment on the merits against the plaintiff class and in favor of the defendants in this action, if a member of the plaintiff class thereupon commenced an action in France against one or more of the defendants in this action.

2. I have studied the Complaint in this action. I, am of the opinion that, assuming that a French court had jurisdiction, an action would lie against the same defendants, if the facts alleged in the Complaint were proved, in favor of a purchaser of Common Shares of I.O.S. Ltd., in one of the three offerings described in the Complaint, under Article 1382 of the French Civil Code, which reads as follows:

"Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."

3. As to the jurisdiction of the French courts, a French court would entertain such an action under Article 1382, on behalf of a French plaintiff, against any defend-



ant who can be found or whose property can be attached in France, under Article 14 of the French Civil Code, which reads as follows:

"A foreigner, even if he does not reside in France, may be brought before the French courts to enforce obligations contracted by him in a foreign country in regard to Frenchmen."

4. A French court would also entertain such an action under Article 1382 on behalf of any plaintiff, French or not, against defendant Banque Rothschild, which is a bank organized as a corporation (société anonyme) under the laws of the Republic of France with its principal place of business (siège social) in Paris, under Article 15 of the French Civil Code, which reads as follows:

"A Frenchman may be brought before a French court for obligations contracted by him in a foreign country, even with a foreigner."

A plaintiff, French or not, who brought such an action against Banque Rothschild would, in my opinion, be permitted to join any other defendant named in the Complaint who could be found or whose property could be attached in France pursuant to Article 59 of the French Code of Civil Procedure, which permits the bringing of an action:

"If there are several defendants, before the court of the domicile of any of them, at the choice of the plaintiff ...".

5. The maximum period of prescription which would govern the bringing of any such action under Article 1382 is thirty years. Article 2262 of the French Civil Code provides:

"All actions, real as well as personal, are prescribed after thirty years, and he who alleges this prescription shall not be obliged to rely upon a title and may not be opposed by the exception based on bad faith."

Shorter periods of prescription are provided for particular categories of cases in Articles 2265, 2271-73, 2276-77, and 2279 of the Civil Code, but none of these periods has any application in the present case. Thus any of the actions described in paragraphs 3 and 4 could be brought at any time within thirty years after the offerings of Common Shares of I.O.S., Ltd. in 1969, except with respect to any of the facts alleged in the complaint which may be found to constitute a penal fault under a specific provision of French statute law (which cannot be determined from the

Complaint alone but only from all the facts as ultimately proved) as to which the period of prescription may be as short as three years depending upon the statutory provision involved.

6. If the present action is maintained as a class action on behalf of all purchasers of Common Shares of I.O.S., Ltd. in the 1969 offerings, and if it results in a judgment against this class in favor of the defendants, a defendant may try to use this judgment as a bar to a new action in France under Article 1382 by a member of the class against one or more of the defendants. Whether a French court would recognize the judgment as a bar to such a new action under Article 1382 is a question which to my knowledge has not yet been decided by a French court, because there is no analogue in French procedure to an American class action maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure. In light of general principles of French law and public policy (*ordre public*), however, it is possible to render a quite firm opinion regarding the effect which a French court would give to such a judgment.

7. If the members of the class are not required at the outset to "opt in", i.e., to sign and return a writing agreeing to be bound by any judgment in this action, it is my opinion that a French court would not recognize a judgment in favor of defendants in this action as a bar to a new action under Article 1382. It is a basic principle of French positive law that to renounce the right to go to justice, just as to enter into an engagement, there must be a positive act. A purely negative act, such as a failure to respond, does not suffice. The adage "He who is silent consents" has in principle no validity in French positive law. Moreover, the jurisdiction of the French courts under Articles 14 and 15 of the French Civil Code, based upon the French nationality of the plaintiff or defendant, has the effect that the French courts will not recognize the exclusive competence of a foreign court in civil matters to pass upon such a case unless the jurisdiction of the French courts has been expressly waived by all parties. A mere failure to respond to a notice would not constitute such a waiver. For all these reasons, a class member who had not "opted in", and was considered by this Court to be



a member of the class solely because he had not "opted out" would not be bound in a French court by the judgment in this action.

8. If prospective members of the class were required to "opt in" in order to become members of the class, it is much more likely that a French court would recognize a judgment adverse to the class in this action as barring a new action in France under Article 1382. The required "opting in" would furnish the positive act which is an indispensable requisite for binding a prospective plaintiff by the result in this action. It is impossible to state that a French court would recognize the judgment in this action even if "opting in" were required, however, for two reasons.

9. First, a French court might well hold that even a prospective class member who had "opted in" was not bound by the result in this action because he did not have the full rights of a party in this action, including the right to choose his own counsel, the right to participate in pretrial proceedings and trial, and the right to appeal. It is my understanding that in an American class action under Rule 23 of the Federal Rules of Civil Procedure all these matters, instead of being unconditional rights of a class member, are subject to the sound discretion of the Court. A French court might regard these rights of a class member as being too restricted and conditional to permit him to be bound by the result in this action.

10. Second, a French Court might view the legal theory and purposes of an action under Article 1382 as being essentially different from those of the present action. That is, if this Court limits itself to questions arising under the securities laws of the United States, a French Court could not hold that questions of substantive French law had been taken into consideration. This conclusion would apply unless the questions arising under American law were substantially the same as the questions of fact and law which would arise under Article 1382. An action based upon the securities laws of the United States may raise substantially different questions of fact and law from those which would arise in an action in France under Article 1382 which is extremely general in its terms. Moreover, accord-

ing to the French system of law, a complaint based upon a specific law such as French security laws may be rejected insofar as it is based upon a specific law, although the Court could permit the action to be maintained under the general protection given the plaintiff under the general terms of 1382. Accordingly, to the extent that any judgment did not cover such questions of fact and law it would lack any binding effect in France. In this event, a French Court would not regard an action under Article 1382 as being precluded by the result in this action.

11. In summary, my conclusions of law are as follows:

- a) The facts alleged in the Complaint, if true, would support an action under Article 1382 of the French Civil Code against the defendants named in the Complaint by any purchaser of Common Shares of I.O.S., Ltd. in one of the three 1969 offerings;
- b) Such an action under Article 1382 could be brought (1) by a French plaintiff against any defendant who could be found or whose property could be attached in France, and (2) by any plaintiff against defendant Banque Rothschild together with any other defendants who could be found or whose property could be attached in France;
- c) The period of prescription applicable to such an action is thirty years, except in the case of application of a penal statutory provision;
- d) Such an action would not be barred by a judgment adverse to the class in this action if the plaintiff in such an action had not expressly "opted in" as a member of the plaintiff class in this action;
- e) Such an action might, but would not necessarily, be barred by a judgment adverse to the class in this action even if the plaintiff in such an action had expressly "opted in" as a member of the plaintiff class in this action.

born to before me this  
day of October, 1973

*Carol B. Reavis*

Carol B. REAVIS  
Vice-Consul

*Charles J. Tobin*



100A  
**Notice of Motion of J. H. Crang & Co. to  
Dismiss Complaint (Without Exhibits)**

150A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

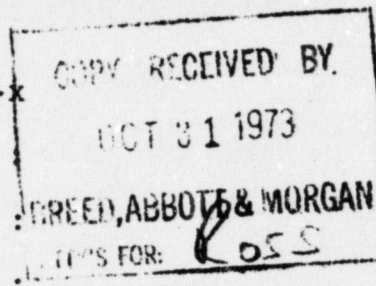
-----x  
HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL  
HARRIMAN RIPLEY, BANQUE ROTHSCHILD,  
HILL SAMUEL & CO., LIMITED,  
GUINNESS MAHON & CO., LIMITED,  
PIERSON, HELDRING & PIERSON,  
SMITH, BARNEY & CO. INCORPORATED,  
J. H. CRANG & CO., INVESTORS  
OVERSEAS BANK LIMITED, ARTHUR  
ANDERSEN & CO., I.O.S., LTD., and  
BERNARD CORNFELD,

Defendants.  
-----x



: Index No.  
: 71 Civ. 5373 (SJR)

: NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the deposition of  
Murray J. Howe sworn to April 28, 1972; the affidavit of  
Anthony F. Phillips sworn to October 30, 1973; the affidavit  
of Gilbert S. Bennett sworn to October 30, 1973; the  
affidavit of Frederick McCann sworn to December 5, 1972;  
Plaintiff's Answers to Interrogatories and the prior pro-  
ceedings had herein, the undersigned will move this Court  
before the Honorable Sylvester J. Ryan, at 10:00 A.M. on  
November 12, 1973 or as soon thereafter as counsel may be  
heard in Room        of the United States Courthouse, Foley  
Square, New York, for an order dismissing the Complaint as to  
J. H. Holdings Ltd. (sued herein as J. H. Crang & Co.) on the  
grounds of lack of personal jurisdiction or lack of subject  
matter jurisdiction or, alternatively, for an order dismiss-  
ing the Complaint on behalf of foreign citizens who purchased  
common stock of I.O.S., Ltd. on the ground of forum non

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Court may deem just and appropriate.

Yours, etc.

WILLKIE FARR & GALLAGHER  
Attorneys for J. H. Holdings Ltd.

By Allen J. Connell  
A Member of the Firm  
Office & P.O. Address  
One Chase Manhattan Plaza  
New York, New York 10005

TO:

SILVERMAN & HARNES  
Attorneys for Plaintiff  
One Rockefeller Plaza  
New York, New York 10020

DAVIS POLK & WARDWELL  
Attorneys for Defendants Smith Barney & Co.  
and Banque Rothschild  
1 Chase Manhattan Plaza  
New York, New York 10005

BREED ABBOTT & MORGAN  
Attorneys for Defendant  
Arthur Andersen & Co.  
1 Chase Manhattan Plaza  
New York, New York 10005

SULLIVAN & CROMWELL  
Attorneys for Defendants Lexard & Co. Inc.  
Hill Samuel & Co., Pierson  
Heldring & Pierson and Guinness & Co. Limited  
48 Wall Street  
New York, New York 10005

PAUL, WEISS, RIFKIND, WHARTON, & GARRISON  
Attorneys for Defendant  
Investors Overseas Bank Ltd.  
345 Park Avenue  
New York, New York



**Affidavit of Anthony F. Phillips in Support of  
Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

HOWARD BERSCH,

Plaintiff,

--against--

DREXEL FIRESTONE, INC., DREXEL  
HARRIMAN RIPLEY, BANQUE ROTHSCHILD  
HILL SAMUEL & CO., LIMITED,  
GUINNESS MAHON & CO., LIMITED,  
PIERSON, HELDRING & PIERSON,  
SMITH, BARNEY & CO. INCORPORATED,  
J. H. CRANG & CO., INVESTORS  
OVERSEAS BANK LIMITED, ARTHUR  
ANDERSEN & CO., I.O.S., LTD., and  
BERNARD CORNFELD,

Defendants.

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Index No.

71 Civ. 5373

AFFIDAVIT

-----x

STATE OF NEW YORK     )  
                              :    ss.:  
COUNTY OF NEW YORK    )

ANTHONY F. PHILLIPS, being duly sworn, deposes  
and says:

1. I am a member of the Bar of this Court and of  
the State of New York and a member of the firm of Willkie  
Farr & Gallagher, attorneys for J. H. Holdings, Ltd., sued  
herein as J. H. Crang & Co. ("Crang"). I make this affidavit  
in support of Crang's motion for an order dismissing this  
action as to it or alternatively drawing the class to exclude  
foreign purchasers of common stock of I.O.S., Ltd. and to  
dismiss the claim of such purchasers on the ground of forum  
non conveniens.

2. This case involves three separate but concurrent  
offerings in September, 1969 of the common stock of I.O.S.

Ltd. Crang was the lead underwriter of an offering in Canada of previously issued I.O.S. shares pursuant to a prospectus drafted by it and its Canadian attorneys. Crang is a Canadian corporation having no office or representative in the United States.

The issue presented by joinder of Crang in this action is whether the acts of a Canadian brokerage house with respect to an offering in Canada of shares of a Canadian corporation are to be subjected to the standards of the United States securities laws where it performed in the United States no acts essential to the offering and where the offering and Crang's prospectus were duly registered with each of the eleven Canadian provincial securities commissions. The issue Crang raises is, therefore, different from that involving underwriters offering shares pursuant to the other prospectuses concerning I.O.S., Ltd. common stock. First of all, Crang's offering was the only offering which was regulated. Secondly, unlike Drexel Firestone, Inc. and Smith Barney & Co., Crang is not a United States securities dealer and plaintiff can point to no decision, whether or not significant, which was made by Crang in the United States. Moreover, unlike Investors Overseas Bank Ltd., Crang made no sales to United States citizens and warranted that it would make no such sales. For the reasons set forth in the memorandum of law submitted herewith, we submit that the United States securities laws do not apply to Crang's offering of I.O.S., Ltd. shares and that this Court lacks personal jurisdiction over Crang as well as subject matter jurisdiction over the Crang offering.



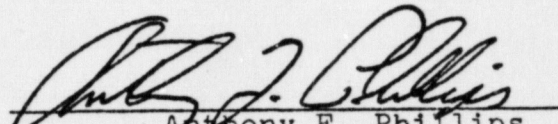
3. Discovery with respect to the issues of subject matter and personal jurisdiction over Crang is complete. Submitted herewith is a copy of the deposition of Crang's president, Murray J. Howe. The exhibits to that deposition are annexed hereto as Exhibit A. During the course of discovery, plaintiff requested and received the shareholder distribution lists of each member of Crang's banking group certifying no sales to United States citizens in the form annexed as Exhibit B. Crang also produced a list showing a sample of the commissions earned by Crang for transactions performed in Canada on behalf of clients resident in the United States and a sample showing the gross commissions charged to Crang's clients by United States brokerage houses for performing transactions over United States exchanges. Crang passed such transactions on to merely accommodate its clients and earned no commissions from such transactions. Those samples, and a table comparing them to Crang's over-all business, together with a letter dated January 10, 1973 from our firm to plaintiff's attorney concerning those samples, are annexed hereto as Exhibit C.

4. Because plaintiff claims that this Court has jurisdiction over all three underwritings because sales to United States citizens were made by Investors Overseas Bank, Ltd. in its underwriting, annexed hereto as Exhibit D is the list submitted by I.O.S., Ltd. to the United States Securities and Exchange Commission showing that sales were made only to employees of I.O.S., Ltd. and its affiliated companies, in compliance with the S.E.C. consent judgment of May 23, 1967. That order permitted sales to such employees and the S.E.C. has not taken any action.

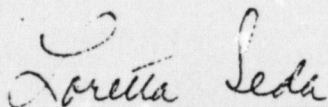
155 A

5. Also annexed hereto is the affidavit of Gilbert S. Bennett, Esq., a member of the Toronto law firm of Zimmerman & Winters. Mr. Bennett worked on the Crang prospectus and he avers that it was prepared in Canada, Switzerland and France. Moreover, he fully discusses the registration of Crang's prospectus in Canada. The affidavit of Mr. Frederick McCann, annexed hereto, shows that none of the addresses given by those persons who purchased I.O.S. shares from Crang were addresses in the United States.

WHEREFORE, it is respectfully submitted that Crang's motion to dismiss the complaint as to it should be granted in all respects.

  
Anthony F. Phillips

Sworn to before me this  
30<sup>th</sup> day of October, 1973.

  
Notary Public

LORETTA SEDA  
Notary Public, State of New York  
No. 24-3579135  
Qualified in Kings County  
Commission Expires 10/20, 1975



**Affidavit of Gilbert S. Bennett in Support of  
Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL  
HARRIMAN RIPLEY, BANQUE ROTHSCHILD  
HILL SAMUEL & CO., LIMITED,  
PIERSON, HELDRING & PIERSON,  
SMITH, BARNEY & CO. INCORPORATED,  
J. H. CRANG & CO., INVESTORS  
OVERSEAS BANK LIMITED, ARTHUR  
ANDERSON & CO., I.O.S., LTD., and  
BERNARD CORNFELD,

Defendants.

AFFIDAVIT

-----X  
DOMINION OF CANADA )

: ss.:

PROVINCE OF ONTARIO )

GILBERT S. BENNETT, being duly sworn, deposes

and says:

1. I am a Solicitor and a partner of the firm of Zimmerman, Grant, Paddon, Bennett & Worley, Toronto, Canada. During the summer and fall of 1969, my firm, then, Zimmerman & Winters, was retained by J. H. Crang & Co. ("Crang") as counsel in connection with the underwriting of common shares of I.O.S., Ltd. ("IOS") by Crang in Canada. I was the solicitor who principally worked on that engagement.

2. The Crang offering was made pursuant to a prospectus which was finally cleared by each of the ten Canadian securities commissions on September 23, 1969 (the "Canadian prospectus"). I worked on and supervised the preparation of the Canadian prospectus and, in connection therewith, I visited

Geneva, Switzerland on numerous occasions throughout the summer of 1969 for the purpose of discussing the prospectus. Each draft was prepared either in France, Switzerland or in our offices in Toronto and all work on the Canadian prospectus done by me or any member of my firm was done in Canada, Switzerland or France or on airplanes flying between those countries. No work was done in the United States and neither I nor (to my knowledge) any member of my firm ever met with anyone in the United States concerning the Canadian prospectus or the offering of IOS shares.


3. To my knowledge, no member of my firm ever discussed the Canadian prospectus with or made a draft available to anyone from the group headed by Drexel, Harriman & Ripley or any law firm acting on their behalf. To my knowledge, the only telephone conversation any member of my firm had with Drexel or its solicitors was a telephone call from Mr. Murphy advising that Drexel was affixing a sticker to its prospectus concerning an action that the United States Securities and Exchange Commission had taken with respect to prior IOS action. The Canadian commissions informed us that Crang should not put such a sticker on its prospectus. I took no part in the preparation of the prospectus of Investors Overseas Bank ("IOB"). To my knowledge, neither the Drexel prospectus nor the IOB prospectus was reviewed by any member of my firm prior to the time the shares they offered were sold.

4. The Canadian prospectus was filed with each Canadian provincial securities commission. The filing was an extremely difficult and time-consuming matter and many of the securities commissions submitted substantial deficiency letters relating to the preliminary prospectus submitted for their review.



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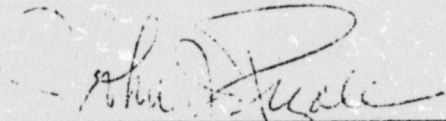
I attach two of those letters and my written replies thereto. As can be seen from those two letters, Canadian security commissioners questioned many items including negotiation of the selling price, the use of proceeds of the underwriting and material contracts. Changes in the prospectus were made to reflect their concerns and I spent numerous hours meeting with and discussing the prospectus with various commissions in order to comply with the requirements of the many regulations of each commission concerning the prospectus and to secure their approval.



---

Gilbert S. Bennett

Sworn to before me this  
30th day of October, 1973.



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A Notary Public in and for the  
Province of Ontario, Canada

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Affidavit of Fred V. McCann in Support of  
UNITED STATES DISTRICT COURT Motion to Dismiss Complaint

SOUTHERN DISTRICT OF NEW YORK

----- X  
HOWARD BERSCH, :  
 :  
Plaintiff, : 71 Civ. 5373  
- against - :  
 :  
DREXEL FIRESTONE, INC., et al., : AFFIDAVIT  
 :  
Defendants. :  
----- X

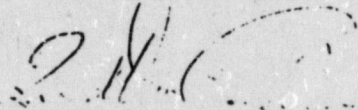
DOMINION OF CANADA )  
 : ss.:  
PROVINCE OF ONTARIO )

FRED V. McCANN, being duly sworn, deposes and  
says:

1. I am the Secretary of JHC HOLDINGS LIMITED formerly  
called J. H. CRANG & CO. LIMITED ("Crang") named as a  
defendant in this action. I make this affidavit to explain  
the steps taken by Crang to comply with item number 2 of the  
list of documents that Crang has agreed to produce herein as  
contained in the letter from Crang's counsel in this action  
to counsel for the plaintiff dated November 10, 1972.

2. Upon inspection of Crang's computer printout sheet  
listing the sales of shares of I.O.S., Ltd. sold by Crang to  
its customers during the underwriting in Canada in 1969, I  
found that the sheet contained only a client identification  
number and did not contain the addresses of the customers.  
Subsequently, I personally reviewed all client accounts of  
customers of Crang who purchased shares of I.O.S., Ltd. from  
it during the underwriting which Crang headed in 1969 and  
found that no such clients had addresses in the United States  
of America at such time.

Sworn to before me this  
5th day of December, 1972.

  
Fred V. McCann

\_\_\_\_\_  
A Notary Public in and for  
the Province of Ontario



**Notice of Motion of Drexel Firestone, Inc.,  
et al., to Dismiss Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
HOWARD BERSCH,

Plaintiff, : 71 Civ. 5373

-against-

: NOTICE OF MOTION

DREXEL FIRESTONE, INC., et al., :

Defendants. :

----- x

S I R S :

PLEASE TAKE NOTICE that upon:

1. The papers in opposition to plaintiff's 1972 motion for an order determining that this action is maintainable as a class action, including the affidavits of Bertram D. Coleman, sworn to on or about April 28, 1972; Walter W. Ruegger and Murray J. Howe, sworn to April 28, 1972; and Kenneth L. Beaugrand, sworn to May 15, 1972;

2. The affidavits of Charles Jolibois and Ercole Graziadei, sworn to November 27, 1972 (submitted by Messrs. Davis Polk & Wardwell with their notice of motion of this date); John Godfray Le Quesne (Exhibit A hereto); Jan-Peter de Wall (Exhibit B hereto); and Peter Hafter (Exhibit C hereto);

3. The depositions of Bertram Coleman (April 5, 1973), Grayson Murphy (May 2, 1973), Murray J. Howe (June 6, 1973), Hugh Knowlton, Jr. (June 19, 1973), Frederick M. Werblow (June 20, 1973) Wilbur

S. Duncan (July 17, 1973) and Walter W. Ruegger  
(August 29, 1973);

4. The affidavits of Jacques Henri Warrelink  
(Exhibit D hereto); Peter Grandin Gallichan (Exhibit  
E hereto) and Hugh Meyer Sassoon (Exhibit F hereto);  
and

5. All of the other papers and proceed-  
ings heretofore had herein,

the undersigned will move this Court before the Hon.  
Sylvester J. Ryan in Room 1106 of the United States Court  
House, Foley Square, in the Borough of Manhattan, City,  
County and State of New York, on December 20, 1973 at  
10 a.m., or as soon thereafter as counsel can be heard, for  
an order pursuant to F.R.C.P. 23(c)(1) directing that the  
conditional class determination by order of the Hon. Marvin  
E. Frankel on June 28, 1972 be altered and amended to pro-  
vide that (1) the action may not be maintained as a class  
suit or, alternatively, that (2) foreign nationals who  
purchased outside the United States be excluded from the  
class; and for an order pursuant to F. R. Civ. P. 12(b)(2)  
dismissing the complaint as to defendants Hill Samuel & Co.  
Limited, Guinness Mahon & Co. Limited, and Pierson, Heldring  
& Pierson for lack of personal jurisdiction.

Dated: New York, New York

October 31, 1973

Yours, etc.,

SULLIVAN & CROMWELL

By **MARVIN SCHWARTZ**

(A Member of the Firm)

Attorneys for Defendants  
Lexerd & Co., Inc. (formerly known  
as Drexel Firestone, Inc.),  
Hill Samuel & Co. Limited,  
Guinness Mahon & Co. Limited,  
Pierson, Heldring & Pierson  
48 Wall Street  
New York, New York 10005  
(212) 952-8100



161A

TO: SILVERMAN & HARNES  
Attorneys for Plaintiff  
One Rockefeller Plaza  
New York, New York 10020

DAVIS POLK & WARDWELL  
Attorneys for Defendants  
Banque Rothschild  
Smith, Barney & Co. Incorporated  
One Chase Manhattan Plaza  
New York, New York 10005

WILLKIE FARR & GALLAGHER  
Attorneys for Defendant  
J. H. Holdings, Ltd. (sued  
herein as J. H. Crang & Co.)  
One Chase Manhattan Plaza  
New York, New York 10005

PAUL, WEISS, RIFKIND, WHARTON & GARRISON  
Attorneys for Defendant  
Investors Overseas Bank Ltd.  
345 Park Avenue  
New York, New York 10022

BREED ABBOTT & MORGAN  
Attorneys for Defendant  
Arthur Andersen & Co.  
One Chase Manhattan Plaza  
New York, New York 10005

**Affidavit of John G. LeQuesne in Support of Motion to Dismiss,  
Exhibit A Annexed to Drexel, Firestone Motion**  
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

HOWARD BERSCH,

:

Plaintiff, : 71 Civ. 5373 (SJR)

-against-

: AFFIDAVIT

DREXEL FIRESTONE, INC., et al., :

Defendants. :

----- x

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND )  
LONDON, ENGLAND )

: ss.:

EMBASSY OF THE UNITED STATES OF AMERICA )

JOHN GODFRAY LE QUESNE, being duly sworn, says:

1. I was called to the bar by the Honourable Society of the Inner Temple in 1947. I have practised at the bar continuously ever since. In 1962 I was appointed to be one of Her Majesty's Counsel. My practice consists largely of civil litigation of a commercial kind before the High Court and the higher tribunals in England and I have particular experience of appeals from territories overseas to the Judicial Committee of the Privy Council. I have my offices at 1, Crown Office Row, Temple, London EC 4. I make this affidavit in order to provide the Court with my opinion regarding the effect which the English courts would give to a judgment on the merits against the plaintiff class and in favor of the defendants in this action, if a member of the plaintiff class thereupon commenced an action in England against one or more of the defendants in this action.



2. I have read the complaint in this action and it is my opinion that a purchaser of IOS Ltd. common shares in any of the three offerings referred to in the complaint who was shewn a prospectus and purchased the shares in reliance on that prospectus could maintain an action against various of these same defendants if the facts alleged in the complaint were proved, provided the English court had jurisdiction.

3. A purchaser of shares who purchases them as a result of reliance upon misrepresentations contained in a prospectus is entitled to the following remedies in English law:

(a) an action for rescission of the contract of issue or purchase;

(b) an action for damages for misrepresentation.

4. An action for rescission lies, in a case of newly issued shares, against the company issuing them, and in other cases, against the seller of the shares to the plaintiff. Almost all, if not all, the reported examples of actions of this type belong to the former class; an example is Reese River Silver Mining Co. v. Smith (1869), L.R. 4H.L.64. The plaintiff has to shew that the prospectus contained a material misstatement of fact. He has to shew that a misstatement influenced him to subscribe for the shares, though it need not have been the sole consideration influencing him (Edgington v. Fitzmaurice (1884)), 29 Ch.D. 459, 481, 483, 485). It is not necessary to shew that those responsible for the prospectus knew the misstatement to be untrue or were negligent in not discovering it to be untrue (cf. Lord Cairns in Reese River Silver Mining Co. v. Smith, at p.79). A successful plaintiff is entitled to be repaid

the money which he had paid for the shares, and to have his name removed from the register of members of the company (if the action were not against the company but against the seller of the shares, a successful plaintiff would be entitled to be repaid the money which he had paid for the shares and would have to transfer the shares back to the seller).

5. In the present case, none of the purchasers of IOS stock whom the plaintiff claims to represent could bring an action for rescission against IOS itself, because shares were not issued to any of them by IOS. An action for rescission would have to be brought against the person who sold shares to the particular purchaser bringing the action. Therefore the facts alleged in the complaint, if true, would suffice to support an action for rescission in England against, for example, the English defendants (i.e., Hill Samuel & Co., Ltd. and Guinness Mahon & Co., Ltd.) by anyone who purchased stock in England and was influenced by the alleged misstatements in their prospectus.

6. The right of action for rescission is lost if the purchaser, after becoming aware of the misrepresentation, does any act inconsistent with repudiation of the contract, e.g., if he tries to sell the shares, or accepts a dividend, or makes a further payment upon them; if he fails to repudiate his shares, or to institute proceedings, within a reasonable time after discovering the misrepresentation; or if a winding up of the company is commenced. The right of action is barred six years after the accrual of the cause of action, and for this purpose the cause of action is deemed to have accrued upon the discovery by the purchaser of the misrepresentation. (Limitation Act, 1939, ss.2(1)(a), 26.)



7. An action for damages for misrepresentation lies against one or more of the directors of the company, or any other person responsible for the prospectus. (It may also lie against the company, but is not normally so brought, because a plaintiff cannot both retain his shares and at the same time sue the company for deceit inducing him to acquire them: cf. Lord Cairns, L.C. in Houldsworth v. City of Glasgow Bank (1880), 5 App.Cas. 317, 324/5.) What at common law the plaintiff had to establish appears from the following quotation from the judgment of Lord Campbell, L.C.J. in Gerhard v. Bates (1853), 2 E. & B. 476, 488/9, which was itself a case in which the plaintiff claimed damages for deceit in a prospectus which induced him to acquire shares in a company, the defendant being the managing director of the company:

"Now we consider it clear law, that, if A fraudulently makes a representation which is false, and which he knows to be false, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers a damage, B may maintain an action on the case against A for the deceit; there being here the conjunction of wrong and loss entitling the injured and suffering party to a compensation in damages.  
 . . . "

Lord Campbell refers here to a statement which the maker knows to be false. It is now settled that a statement may be fraudulent though made without knowledge of its falsity. The classic statement is the following by Lord Herschell in his speech in Derry v. Peek (1889), 14 App. Cas. 337, 374:

". . . Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

8. Lord Campbell's statement quoted above must now be read subject to the Misrepresentation Act, 1967, s.2(1), which provides:

"Damages for misrepresentation

2.--(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

The effect of this provision is that, when a plaintiff has been induced by a misrepresentation in a company's prospectus to subscribe for newly issued shares in the company, the directors, or other persons responsible for the prospectus, are liable to the plaintiff unless they prove that they had reasonable ground to believe, and did believe, the facts represented to be true. When the shares have not been issued to the plaintiff by the company but sold to him by a previous holder (as happened in this case), the Misrepresentation Act will apply if the action is brought against the seller of the shares and the seller was responsible for the prospectus. In such a case the defendant has made the misrepresentation and is "another party" to the contract into which the plaintiff has entered. If the action is brought against someone who is responsible for the misrepresentation but is not a party to the contract for the sale of the shares to the plaintiff, the Act will not be applicable and the common law as set out in paragraph 7 above will apply.



9. The relief obtainable in such an action is damages. The measure of damages is the difference between what the plaintiff paid for his shares and what they were worth when he received them.

10. In my opinion, founded upon the terms of the prospectus itself, all the defendants other than Arthur Andersen & Co. are persons responsible for various of the prospectuses in the sense in which I have used that expression in the first sentence of paragraph 7 of this affidavit. The various underwriters, of course, are persons responsible only with respect to their respective prospectuses. The defendants Arthur Andersen & Co. are persons responsible for the statements of consolidated income and retained earnings and the financial statements contained in each of the three prospectuses. The defendants IOS and Cornfeld are persons responsible with respect to all three prospectuses.

11. If all the allegations in the complaint were true, they would suffice to support an action for damages for misrepresentation against various of the defendants by persons who purchased stock in reliance on one of the prospectuses. If such an action were brought against the underwriter who sold that person the stock, the Misrepresentation Act, 1967 would be applicable, because that underwriter would not only be responsible for the misrepresentations in the prospectus but would also be a party to the contract for the sale of the stock. If the action were brought against other of the defendants, the Misrepresentation Act would not be applicable, because those defendants would not be parties to the contract for the sale

of the stock. The consequences of the applicability or non-applicability of the Misrepresentation Act are set out in paragraph 8 of this affidavit.

12. As to the barring of the right of action by lapse of time, the applicable provision is the same as that discussed in the last sentence of paragraph 6 hereof.

13. A person carrying on business in England is subject to the jurisdiction of the English courts. From the point of view of jurisdiction, therefore, there is nothing to prevent a purchaser of shares, whether he is or is not either a national or a resident of this country and whether he purchased the shares in this country or abroad, from suing in England underwriters doing business in England.

14. A purchaser of shares, whether he purchased them in this country or abroad, would have a good cause of action against an underwriter for damages for misrepresentation if he could shew that the underwriter was responsible for a prospectus published or circulated in this country, and could also establish the other matters set out in paragraphs 7 and 8 hereof. For a misstatement contained in a prospectus published or circulated in this country, the underwriter would be held liable by an English court only according to English law, and the court would not take cognisance of any possible liability under the law of any other country. For a misstatement contained in a prospectus published or circulated abroad, the underwriter would be held liable by an English court only if the publication or circulation was not justifiable by the law of the country in which it occurred, and would have been actionable in



England if it had occurred in England: Phillips v. Eyre (1870), L.R. 6 Q.B.1, 28. (Whether the words 'not justifiable' in this rule mean, and mean only, 'civilly actionable' has been much debated. The latest authority is Chaplin v. Boys (1971), A.C. 356, which suggests, without finally deciding, that they do.)

15. From the point of view of jurisdiction, a purchaser of shares, whether or not a national or resident of this country, who purchased shares in England could maintain an action in the English courts in respect of a misstatement in the prospectus against an underwriter not doing business in this country if (a) he could serve the proceedings on the underwriter while the underwriter was, even if only temporarily, physically within the jurisdiction of the English court, or (b) he could get leave from the English court to serve the proceedings on the underwriter out of the jurisdiction. From the point of view of cause of action, the plaintiff in such an action would have to establish the matters set out in paragraph 14 above.

16. The cases in which an English court may authorize service of proceedings out of the jurisdiction are set out in Order 11, rule 1(1) of the Rules of the Supreme Court. The only cases possibly relevant to an action for rescission or to an action based upon a misstatement in a prospectus are the following:

"(f) if the action begun by the writ is brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which --

(i) was made within the jurisdiction, or

(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) is by its terms, or by implication, governed by English law;

. . . . .

(h) if the action begun by the writ is founded on a tort committed within the jurisdiction;

. . . . .

(j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto."

Paragraph (f) would be unlikely to be relevant for present purposes. If the contract sought to be rescinded were a contract made with one of the English defendants, no question of service out of the jurisdiction would arise. If the contract sought to be rescinded were made with one of the other defendants named in this action, it is likely that the contract was made outside of the jurisdiction. If a non-resident made the contract within the jurisdiction, paragraph (f) would of course apply. Paragraph (h) would cover a case in which the prospectus had been published or circulated in England. An action for damages for misrepresentations in a prospectus is an action 'founded on a tort' within the meaning of paragraph (h). Paragraph (j) would be applicable to a case in which the prospectus had been published or circulated abroad and a defendant other than the underwriter had been properly served with the proceedings in England. If the underwriter and that defendant had both been responsible for the publication or circulation of the prospectus, the underwriter would be a 'proper party' to the action. However, the



grant of leave to serve proceedings out of the jurisdiction under Order 11 is always discretionary, but it is likely that the Court in its discretion would grant leave if the publication or circulation of the prospectus had taken place in this country and the plaintiff was resident in this country.

17. The English procedure comparable to class actions in the United States is that of representative proceedings. Representative proceedings are authorized by Order 15, rule 12 of the Rules of the Supreme Court, which provides as follows:

"Representative proceedings (O. 15, r. 12).

12.--(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by

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reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined."

Rule 13, which is mentioned in rule 12(1), applies only to "proceedings concerning -

- (a) the administration of the estate of a deceased person, or
- (b) property subject to a trust, or
- (c) the construction of a written instrument, including a statute."

Where a Plaintiff sues on behalf of a class and a member of that class objects to being represented by him, the Court, according to its practice under Order 15, rule 12, may order that the member be excepted from the class for the purposes of the action, or, if there are several such objections, may refuse to allow the action to proceed as a representative action, thus enabling the individual to bring his own proceedings.

18. It is essential to an English representative action that all those represented should have 'the same interest' in the proceedings. This is emphasized by a number of authorities, of which Markt & Co., Ltd. v. Knight Steamship Co., Ltd. (1910), 2 K.B. 1021 is a good example. It is in my opinion very doubtful whether the 100,000 persons whom the Plaintiff in this action claims to represent would in England be held to have 'the same interest' for this purpose. Even the very much smaller number of persons who purchased stock from the English defendants cannot be said to all have 'the same interest'. I may add two particular points. First, in



Markt & Co.'s Case Fletcher Moulton, L.J. said there could be no representative action where the sole relief sought was damages, because damages were a personal remedy only and had to be proved separately in the case of each plaintiff: see pp. 1035, 1040/1. Secondly, Churchill v. Whetnall (1918), 87 L.J. Ch. 524 is a case analogous to the present case on its facts, though not on its scale, which was held to be 'wanting in the essential conditions of a representative action'.

19. The general rule of English law is that a judgment of a foreign Court in favour of a defendant is a bar to a subsequent action in England against the same defendant on the same cause of action, provided that:

- (i) the foreign Court had jurisdiction over the defendant in the sense explained in paragraph 20 below;
- (ii) the judgment is final and unalterable by the Court which pronounced it (though it may be subject to appeal); and
- (iii) the judgment is not impeachable on the ground of fraud, or inconsistency with public policy or natural justice.

See Jacobson v. Frachon (1927), 138 L.T. 386.

20. English law recognizes a foreign Court as having jurisdiction over a defendant only (apart from cases in which that defendant, before being sued in the foreign Court, has himself instituted proceedings in that Court as plaintiff) if (i) he was resident in the foreign country at the time of the institution of the proceedings, or (ii) he appeared voluntarily in the proceedings in that Court, or (iii) he agreed to submit to the jurisdiction of that

Court: see the judgment of Buckley, L.J. in Emanuel v. Symon (1908), 1 K.D. 302, 309. (Buckley, L.J. adds another ground, viz. that the defendant is a national of the country of the foreign Court, but that is no longer regarded as a ground of jurisdiction.) For this purpose, a corporation is regarded as resident in a foreign country if it is carrying on business in that country at a definite and reasonably permanent place: Littauer Glove Corporation v. F. W. Millington 1920, Ltd. (1928), 44 T.L.R. 746. If this Honourable Court were to give judgment in this action in favour of the defendants on the merits, that judgment would not bar a subsequent action in England by a purchaser represented by the plaintiff in this action against one of the defendants in this action based on the same allegations of falsehood in the prospectus unless this Honourable Court had jurisdiction over that defendant on one of the three grounds set out above.

21. It remains to consider whether, if this Honourable Court did have jurisdiction in this sense over the defendant subsequently sued in England, the effectiveness of its judgment as a bar to the subsequent action in England might be affected by the position in this action of the plaintiff attempting to sue in England. I do not know of any English authority, judicial or academic, bearing upon this question. It is my opinion, however, as set out in paragraphs 22 and 23 below, that the effectiveness of the judgment might be so affected.

22. In my opinion, a purchaser who had received notice of the present action, whether by direct individual notification or otherwise, with an intimation



that he would be bound by the result unless he returned to the Court a signed statement removing himself from the class, and had neither returned such a statement nor taken any part in the action, would not be barred by the judgment in favour of the defendants from bringing a subsequent action in England against one of the defendants based on the same allegations of falsehood in the prospectus.

23. I proceed to give my reasons for this opinion. As I have stated in paragraph 20 above, English law recognizes a foreign Court as having jurisdiction over a defendant only if a defendant has accepted the Court's jurisdiction, either by agreeing to submit to it or by appearing voluntarily. Equally, when an English court is asked to enforce a foreign judgment against a plaintiff, as substantially it is when a defendant asks that the plaintiff's action in England be held barred by a foreign judgment in the defendant's favour, I should expect the court to recognize the foreign Court's jurisdiction over the plaintiff only if he accepted that Court's jurisdiction. A plaintiff normally does this by actually invoking the jurisdiction of the Court. If he has not done this, I should expect an English court to regard the foreign Court as having had jurisdiction over him only if in some way he submitted to it or agreed to submit to it. Mere omission to 'opt out of the class' would not, in my opinion, constitute such submission or agreement.

24. These are the reasons for my opinion stated in paragraph 22 above. On the other hand, if a purchaser received notice of the present action, whether

by direct individual notification or otherwise, together with an intimation that he would be removed from the class for all purposes unless he returned to the Court a signed statement agreeing to be bound by the result, and he did return such a statement, he would, in my opinion, be barred by a judgment of this Honourable Court in favour of the defendants on the merits from subsequently suing ~~and~~ of the defendants in England (subject to paragraphs 19 and 20 above) upon the same allegations of falsehood in the prospectus.

25. To summarize, my conclusions of law are as follows:

(a) The facts alleged in the complaint, if true, would support an action for rescission by any purchaser of IOS common shares in one of the three offerings who was shewn a prospectus and relied upon it against any defendant named in the complaint who sold him the shares and can be found in England or can be served with proceedings under the rules set out in paragraph 16 hereof.

(b) The facts alleged in the complaint, if true, would also support an action for damages for misrepresentation. Such an action could be brought by any purchaser of IOS common shares in one of the three offerings who was shewn a prospectus and relied upon it against those defendants responsible for the prospectus shewn to him and who can be found in England or can be served with proceedings under the rules set out in paragraph 16 hereof. The action could also be maintained against



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additional defendants outside the jurisdiction who were responsible for the prospectus shewn and are thus proper parties to the action.

(c) The period of limitation applicable to each type of action is six years from the time of the purchaser's discovery of the misrepresentation.

(d) Such action in England would not be foreclosed by a judgment against the class and in favour of the defendants in the U. S. action unless the plaintiff in the English action had received notice of the U. S. action and had consented to be bound by the result, and even then the plaintiff would not be bound unless the judgment fell within the rule set out in paragraph 19 hereof.

*John Godfray Le Quesne*  
\_\_\_\_\_  
JOHN GODFRAY LE QUESNE

Sworn to before me this

Twenty-eighth day of September 1973.

*Martha A. Cella*  
\_\_\_\_\_  
American Consul

MARSHA A. CELLA  
Vice Consul of the United States  
of America, London, England

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Affidavit of Jan-Peter De Wall in Support of Motion to Dismiss,  
Exhibit B Annexed to Drexel, Firestone Motion  
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x  
HOWARD BERSCH, :  
 :  
Plaintiff, : 71 Civ. 5373  
 : (SJR)  
-against- :  
DREXEL FIRESTONE, INC., et al., : AFFIDAVIT  
 :  
Defendants. :  
-----x

FEDERAL REPUBLIC OF GERMANY )  
CITY OF HAMBURG )  
 : SS.:  
CONSULATE OF THE UNITED STATES )  
OF AMERICA )

JAN-PETER DE WALL, being duly sworn, says:

1. I am an attorney (Rechtsanwalt) admitted to practice before the District Court (Landgericht) of Hamburg, Federal Republic of Germany. I was first admitted to practice in 1970. Since then I have practised in civil as well as in commercial and labour courts in Hamburg and other parts of Germany. I am a member of the law firm of Stegemann, Sieveking & Lutteroth, 27 Alsterarkaden, Hamburg 36, Germany. This affidavit contains my opinion regarding the effect which the courts in the Federal Republic of Germany would give to a judgment on the merits against the plaintiff class and in favor of the defendants in this action, if a member of the plaintiff class thereafter commenced an action in Germany against one or more of the defendants in this action.

2. I have read the complaint of plaintiff Bersch in this action. I am of the opinion that, if the facts alleged in the complaint were proved, a purchaser of IOS Ltd.



shares in any of the three offerings of shares referred to in the complaint could maintain an action in Germany against any defendant who sold him the shares and against each defendant who knew of any of the false and misleading statements in the prospectus involved, assuming that the German court had local jurisdiction ("ortliche Zuständigkeit"). (This is so if the German court applies German substantive law. If the court finds that the purchaser's rights are governed by the law of another jurisdiction, it will apply the law of that jurisdiction.)

3. German law recognizes three possible causes of action for purchasers of shares who have been misled by misrepresentations in a prospectus. These are codified as follows:

a. Section 823 II 1. BGB (Civil Code), which refers to § 823 I (liability for damages), and provides: "The same obligation [i.e., liability for damages] is imposed on him who violates a law the purpose of which includes the protection of another person." Such a law is § 263 StGB (Criminal Code), which provides:

"He who with the intention to procure an illegal property gain for himself or for a third person inflicts damage on the property of somebody else by creating or keeping up of an error through false pretences or modification or suppression of facts will be punished for fraud by imprisonment up to 5 years or fined."

b. Section 826 BGB, which provides: "He who with intention inflicts damage on another person in a manner violating good morals is obliged to render compensation."

- c. Customary law requires compensation in case of violation of contract (Federal Supreme Court in BGHZ 11, 83), and § 276 I 1.,
2. BGB provides: "He who is under an obligation is liable for intention and negligence unless otherwise determined. Negligence is the omission of such care as may be duly required."

These provisions have been held to apply in cases concerning misstatements in prospectuses and similar documents, e.g., in Federal Supreme Court, BGH NJW 1973, 456; Federal Supreme Court BGH NJW 1963, 2270; Imperial Supreme Court, RG ST 70, 47; Imperial Supreme Court, Recht 1919 No. 585; State Supreme Court Hamburg, OLG 1912, 112.

4. With respect to the causes of action described in Paragraph 3 (a) and (b) above, § 852 BGB provides an absolute statutory limitation after 30 years from the time the damaging act was committed, but if the plaintiff receives knowledge of the damage and knowledge as to the person who committed it he must bring his action within three years from the time he receives the knowledge. Case law holds that knowledge in order to be relevant here must include knowledge of such facts as would reasonably justify filing of suit against the violator, e.g., Federal Supreme Court in BB 1966, 141. In the case of the cause of action described in Paragraph 3(c) above, the general 30-year limitation period of § 195 BGB applies, irrespective of any knowledge whatsoever.

5. The German court would find that it has local jurisdiction of an action brought by a plaintiff, whether German or non-German or resident or non-resident, against



a defendant, whether a legal entity or natural person, if any one of the following rules of the ZPO (Code of Civil Procedure) are satisfied with respect to the defendant:

- §§ 13, 17, 21 ZPO allowing local jurisdiction at the place of domicile of a natural person or legal entity or its branch establishment;
- § 23 ZPO allowing local jurisdiction at the place where a person or entity holds any kind of property;
- § 29 ZPO allowing local jurisdiction at the place where a contractual obligation was to have been fulfilled;
- § 32 ZPO allowing local jurisdiction where tortious acts or parts of it have been committed.

6. I now revert to the question of what effect the German court would give to a judgment entered by the U. S. court in favor of defendants on the merits in the event a purchaser who is a member of the plaintiff class brings suit in Germany claiming he has a cause of action under the substantive laws of this country. In my opinion the question would have to be discussed and decided as follows.

7. The acknowledgement of a foreign judgment in German court proceedings is dealt with in § 328 ZPO. This applies to the execution of foreign judgments as well as to the effect in additional and corresponding proceedings in German courts (Stein-Jonas Commentary § 322 ZPO IV 2.; 328 I 2.a). The contents of that rule, so far as they may

become relevant in the present case, are as follows:

"The acknowledgement of a judgment of a foreign court is excluded

1. if the courts of the state to which the foreign court belongs do not have jurisdiction according to the German law;
2. if the defendant losing the suit is a German national who did not join the suit unless the complaint was served on him in person within the foreign state or by legal assistance of German authorities;
3. . . .
4. if the acknowledgement would violate good morals or conflict with the purpose of a German law;
5. . . . "

The court will have to examine each of these points (which are not cumulative). If acknowledgement cannot be refused under this provision the scope or extent of such acknowledgement as to the respective contents of the judgment in question does -- on principle -- follow the laws of the foreign state and does not depend upon the existence of similar technicalities in German law (Stein-Jonas, § 328 I. 1. a).

8. Under No. 1 of § 328 subsect. 1 the German court will examine the following questions with respect to any individual defendant:

- Did the parties to the U. S. proceedings agree to accept the jurisdiction of the United States court?
- Is the legal domicile -- or if this cannot be determined -- the main place of administration of defendant located in the United States? In case of a branch establishment sued independently: Is this branch located in the United States?



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- Does defendant have substantial assets in the United States?
- Did -- in contract -- the shares purchased have to be delivered in the United States?
- Has -- in tort -- any part of the tortious act been committed within the United States (preparatory measures are not enough; borderline doubtful)?

If in case of the specific defendant none of these questions can be answered in the affirmative, the United States court was -- according to German law -- not competent to issue judgment for or against such defendant; accordingly such judgment will have no effect in German proceedings (§ 328 I. 1. ZPO; see §§ 12, 17, 21, 23, 29, 32 ZPO and paragraph 5 above; Stein-Jonas § 328 IV. 1.).

9. Even if competent jurisdiction of the United States court cannot be denied, the question remains whether the judgment has any effect with respect to such person "engaged" in the U. S. suit only as a member of a class and not as an immediate party.

(a) It is obvious that neither § 328 I. 2. nor § 328 I. 4. ZPO do -- on their face -- cover this problem. Furthermore, there is no other rule in German law directly to the point. In fact, German law does not know anything like a class action. The only principle -- developed in case law -- somehow related is that of "gewillkürte Prozessstandschaft". Under this principle a third party not the owner of the claim may -- if expressly authorized by the actual owner -- file suit in his own name (though internally on behalf of the owner), provided that he has his own substantial interest in choosing such procedure

10. Rule 23 c (2) of the relevant U. S. rules considers it sufficient that notice to class members is given which is "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort".

11. In my view this rule would allow forms of notice which would certainly not meet the requirements as cited in Paragraph 9 above. It is conceivable that the only method "practicable" to reach certain unidentified purchasers is the publication of advertisements in newspapers and/or official gazettes. Certainly nobody in this country is obliged, however, to read such papers. Furthermore, the vast majority could not even be reasonably expected to read such papers, because class actions are unknown in this country. It is obvious, therefore, that a number of purchasers would suffer substantial disadvantages (binding effect of a negative judgment) without even knowing about the suit, if such notice would be deemed sufficient. They would find themselves exactly in that passive situation which the constitutional provisions are supposed to prevent. I am positive, therefore, that a binding effect with respect to persons not positively knowing about the suit and their necessity to "opt out" in order to avoid the binding effect would not be recognized by a German court.

12. This leaves the question whether actual knowledge -- by publications or by individual notice -- of the above facts would be sufficient.

In my view this is not the case, even though the degree of violation of due process is lessened by the



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opportunity to avoid negative results by positive action (opting out). In case of a German defendant sued in a foreign court, § 328 subsect. 1 No. 2 grants recognition of the foreign judgment only if the complaint had been served upon defendant in person in the foreign state or by legal assistance of the German authorities (using the procedure provided for under law). These requirements are not mere formalities. They are held to express a special aspect of ordre public and due process, particularly in view of Art. 103, Sect. 1 of the constitution (Roth, Der Vorbehalt des Ordre Public gegenüber fremden gerichtlichen Entscheidungen, 1967, p. 41; Geimer, JZ 1969, p. 12).

It is true that a direct application of this provision is only possible with respect to a defendant, whereas in our case we deal with a person on whose behalf a suit is filed and who -- as far as the effect is concerned -- is treated like a plaintiff. In connection with the special results of a class action under U.S. law, however, the position is identical: The above provision is designed to avoid procedural disadvantages without certain procedural safeguards; a negative outcome of this suit for plaintiff would in fact lead to procedural disadvantages for the class members of a very substantial nature. Therefore the safeguards must be applied accordingly. A German court would therefore require the forms of notice mentioned in § 328 subsect. 1, 2. in the present case and base its reasoning on that provision in connection with Sect. 328 subsect. 1, 4. ZPO and Art. 103, Sect. 1 of the Constitution.

Accordingly, neither "constructive" notice nor actual notice by publication or individual letter received in Germany would be sufficient. It is necessary to serve notice upon the class member in person in the foreign state or use the official channels of the German courts rendering legal assistance in foreign legal matters.

13. But even if the notice requirements of § 328 I., 2. ZPO are met there are serious doubts whether the German courts would allow the judgment to take effect against the member of the plaintiff class (who does not by positive act opt in, see paragraph 14 below). Rule 23 of the Federal Rules of Procedure does not grant the member of the plaintiff class the unconditional full rights of a party in the action. Therefore, I consider it probable that after consideration of the actual rights the member of the plaintiff class was indeed able to exercise in the specific case, the German court would arrive at the conclusion that the negative act of not opting out was not sufficient to meet the requirements of § 328 ZPO even though official notice was given to the respective member.

14. On the other hand, it is clear that the class member may waive any right granted under the due process requirements of § 328 subsect. 1, 2. (Stein-Jonas, § 328, Note V). If, therefore, the class member in fact joins the litigation, the notice requirements become irrelevant. The same applies if the class member is -- instead of opting out -- offered the opportunity to "opt in". It is obvious that in this case no due process requirements are violated and that this procedure is quite similar to



that of "gewillkurte Prozessstandschaft" as mentioned above (a).

15. The discussion under Paragraphs 7 through 14 above deals only with the formal aspects of a recognition of the judgment of the U.S. court.

The problem does, however, have a very decisive substantive aspect as well. Here the main question is what the American court -- according to its procedural rules and American private international law -- wanted or was able to decide. If, e.g., the American court limits its discussion to an analysis of the United States securities laws, a German court could not hold that the questions of substantive German law, if applicable (see Paragraphs 2 and 3 above), were taken into consideration at all, if and as far as the aspects taken into consideration by the American law do not cover substantially the same aspects of fact and law German law would require to be examined. Accordingly, since the judgment would not cover these questions, it would to that extent lack any binding effect. This is especially important in view of the fact that German law does not recognize res iudicata effect with respect to facts as opposed to questions of law. In other words: Under German law facts in issue and decided by the court never bind the parties in a subsequent suit. The view is held that this limited function of res iudicata (excluding anything like collateral estoppel) also applies in case of foreign judgments even though the foreign law

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ds otherwise (Stein-Jonas, § 328 I. 1. a).

*Jan-Peter de Wall*

JAN-PETER DE WALL

FEDERAL REPUBLIC OF GERMANY  
STATE OF  
FRANKFURT AM MAIN SEESTADT HAMBURG  
CONSUL GENERAL OF THE UNITED STATES OF AMERICA } SS

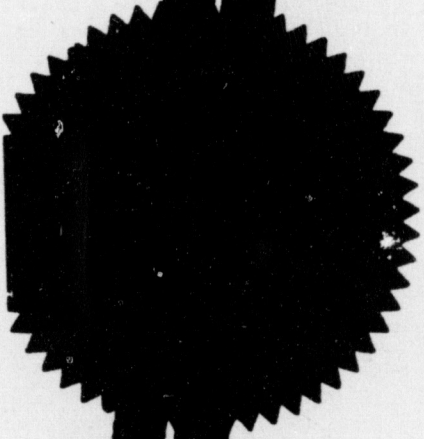
born to before me this  
t day of October, 1973.

*Sarah L. Nathness*

American Consul

Sarah L. Nathness

Consul of the United  
States of America





**Affidavit of Peter Hafter in Support of Motion to Dismiss,  
Exhibit C Annexed to Drexel, Firestone Motion  
UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF NEW YORK

----- -x

HOWARD BERSCH,	:	
	:	
Plaintiff,	:	71 Civ. 5373
	:	(SJR)
-against-	:	
DREXEL FIRESTONE, INC., et al.,	:	<u>AFFIDAVIT</u>
Defendants.	:	

----- -x

SWISS FEDERATION, CITY OF ZURICH,	)
	: ss.:
CONSULATE OF THE UNITED STATES OF AMERICA	)

PETER HAFTER, being duly sworn, says:

1. I am an attorney (Rechtsanwalt) admitted to practice in the Canton of Zurich, Switzerland. I studied law at the University of Zurich (Doctor of Law 1957) and at Harvard Law School (LL. M. 1962) and I was admitted to the Zurich bar in 1958. I am a partner of the firm Staehelin & Giezendanner, Bleicherweg 58, Zurich. I make this affidavit in order to furnish the Court my opinion regarding the effect which the Swiss Courts would give to a judgment on the merits of this case of the United States District Court, Southern District of New York against the plaintiff class and in favor of the defendants, if a member of the plaintiff class thereafter commenced an action in Switzerland against one or more of the defendants in this action.

2. Assuming that a Swiss Court had jurisdiction and that Swiss law would apply, a plaintiff might attempt to bring action in Switzerland on the following causes:

(a) Under art. 41, sec. 1 of the Swiss Code of obligations (CO), concerning torts, which reads as follows:

"Whoever unlawfully causes damage to another person, whether intentionally or negligently, shall be liable for reimbursement."

(b) Under art. 197, sec. 1 concerning liability for defects of assets sold which reads as follows:

"The seller is responsible to the purchaser for the warranted qualities and for the absence of physical or legal defects of the asset which destroy or substantially reduce its value or its usefulness for the intended purpose."

(c) Under art. 752 CO, concerning liability based on the issuance of a prospectus, which reads as follows:

"If upon the organization of a corporation or upon the issuance of shares or debentures, information was given or distributed in prospectuses, circulars or similar notices which was incorrect or not complying with legal requirements, then, whoever has intentionally participated shall be liable to the shareholders or to the owners of debentures for the damage created thereby."

3. An action based on tort would in the absence of special defenses be sustained by a Swiss Court if the Court is satisfied of the following facts:

(a) Damage was caused to the plaintiff.

(b) The act (or acts) by the defendant (or in case of a corporate defendant of its authorized officers) constituted a conditio sine qua non for the damage and it must have been foreseeable that an act of this kind might cause damages (so-called "adaquater Kausalzusammenhang").

(c) The act was unlawful. Under the law developed by the Swiss Federal Court it is



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sufficient that the act was "contrary to the general rules of our legal system" (BGE 47, II 179) and that it was not justified by specific rights or circumstances.

(d) The defendant has been "at fault", causing the damage either intentionally or negligently.

The applicable statute of limitations is found in art. 60, sec. 1 and 2 CO, which read:

"The claim for compensation for damages or for compensation for suffering and pain is barred one year after the date when the prejudiced party obtained knowledge of the damage and of the party which is liable, or ten years after the date of the act causing the damage whichever is earlier.

"Where the action is based on a crime for which penal law provides for a longer statute of limitations, then such longer statute of limitations shall apply also to the claim of the prejudiced party."

In the decision Meer v. Born of January 14, 1956, BGE 82 II 44/45 the Swiss Federal Court has summarized the law concerning plaintiff's knowledge in case of art. 60 CO as follows:

"The affected person does not necessarily have 'knowledge' of the damage when he knows that he has been damaged, but only when he knows in what the damage consists and how high the damage is. He is not in a position to file a suit for damages as long as he is not aware of the factual conditions of his claim (BGE 74 II 33 ff). For the same reason there is no 'knowledge of the party which is liable' where the damaged person suspects that a person might be liable for reimbursement, but only if he knows the facts which create the obligation to reimburse."

Three provisions of the Swiss Penal Code (PC) which might be invoked in connection with the issuance of a

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prospectus in order to gain a longer statute of limitations are the following:

- i. Art. 148 PC on fraud ("Betrug"), which reads in pertinent part:

"Whoever, with the intention to enrich himself or another, deceitfully misleads somebody by pretending or suppressing facts or by exploiting the error of the other, and thereby induces the erring person to a behavior by which the erring person causes damage to the fortune of himself or of a third person, shall be punished by imprisonment of up to five years or by simple imprisonment."

The statute of limitation in case of fraud expires ten years after the date of the crime.

- ii. Art. 152 PC on incorrect information about companies and co-operative associations, which reads:

"Whoever, as founder, partner, manager, president, representative, as member of the board of directors or of the auditors or as liquidator of a company or of a co-operative association releases to the public information or reports to the shareholders' meeting incorrect statements of substantial importance, or causes such statements to be made, shall be punished by simple imprisonment or by fine."

The statute of limitation in case of this crime expires after five years.

- iii. Less relevant with respect to the publication of a prospectus containing misrepresentations, but nevertheless of possible application is Art. 158 PC on inducement to speculation, which reads:

"Whoever with the intention to procure for himself or for a third person a financial advantage, uses the lack of experience of a



person in stock exchange transactions or the lightmindedness, in order to induce such person to speculate in securities or commodities, although he knows or should know that there is an obvious disproportion between the speculation and the fortune of the induced person, shall be punished by simple imprisonment or by fine."

The statute of limitations for this crime expires after five years.

4. An action based on liability for defect of assets sold would in the absence of special defenses be sustained by a Swiss Court if it were satisfied of the following facts:

(a) There is a contractual relationship between plaintiff and defendant. In other words the action can only be brought by a plaintiff who acquired the shares from the respective defendant.

(b) The defendant must have warranted that the shares sold had certain qualities and these warranties must have been incorrect; the defendant's delivery to the plaintiff of a prospectus containing essential misrepresentations prior to the sale would in my opinion constitute such a breach of warranty.

(c) The plaintiff must have given notice to the defendant "Immediately after he became aware" of these defects (art. 201 CO) except if he can prove that he was deceived intentionally by the defendant (art. 203 CO).

The applicable statute of limitations is found in art. 210 sec. 1 and 3 CO which read:

"Actions based on the liability for defects of assets sold are barred one year after the delivery to the purchaser even when the purchaser discovers the defects only at a later date, except if the seller has assumed liability for a longer period of time."

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"The statute of limitations expiring after one year cannot be invoked by the seller if it can be shown that he has deceived the purchaser intentionally."

If the seller has deceived the purchaser intentionally (mere negligence is not sufficient) the statute of limitations expires ten years after the date of the sale (art. 127 CO).

5. An action based on liability for the issuance of a prospectus would in the absence of special defences be sustained by a Swiss Court if it were satisfied of the following facts:

(a) Damage was caused to the purchaser of the shares.

(b) The damage was caused by incorrect information in a prospectus for the issuance of shares.

(c) The defendant participated in the preparation or distribution of the prospectus.

(d) Intent or negligence of the defendant (he knew or he should have known if applying due care that the information was incorrect).

Art. 760 CO concerning the statute of limitations for claims against the issuers of a prospectus provides:

"Claims for damages against the persons responsible under the above mentioned provisions are barred five years after the date on which the prejudiced party obtains knowledge of the damage and of the persons liable or ten years after the date of the action causing the damage whichever is earlier. If the action is based on a criminal act and if the penal law provides for a longer statute of limitations, then this longer statute of limitations shall also apply to the claim for damages."

In order to gain a longer statute of limitations, the purchaser may attempt to invoke the same three provisions of the Penal Code as discussed in paragraph 3 above.



6. Assuming a Swiss Court had jurisdiction and were to apply Swiss substantive law, it is my opinion that if the facts alleged in the complaint were true, an action would lie against defendants Cornfeld, IOS and Arthur Andersen. Under the same assumptions an action would lie against any participating underwriter of whom it could be proved that it knew of the relevant facts alleged in the complaint. Furthermore, it is likely that an action would lie against a participating underwriter who sold IOS shares to a particular plaintiff, even where it cannot be proved that the respective defendant knew the relevant facts alleged in the complaint.

It cannot be determined solely on the basis of the facts alleged in the complaint whether an action would also lie against other participating underwriters who did not sell shares directly to the particular plaintiff. This is so since for purposes of Swiss law I cannot consider the statements that they "should have known" (Complaint, para. 11) certain facts and that they did not use "due diligence" (Complaint, para. 12) in connection with the preparation of the prospectuses as statements of fact but as conclusions of law. Since the factual basis for these conclusions are not sufficiently specified in the complaint, I am not in a position to opine whether or not a Swiss court would accept these conclusions. However, if additional facts were alleged and proved that the participating underwriters were at fault by causing the damage negligently or by failing to apply due care, then an action would also lie against them.

7. Under art. 59 of the Swiss Federal Constitution a Swiss Court would have jurisdiction over an action brought by a purchaser of Common Shares of I.O.S. Ltd. against any defendant having its residence (or in case of a corporate defendant its registered office) within the territory of the court. Under Swiss federal law the court also has jurisdiction of companies at the location of their "registered branches" with respect to claims related to the activities of the branch. Whether a Swiss Court would have jurisdiction over an action against a non-resident defendant depends on the laws on civil procedure of the respective Canton (the Swiss Confederation is divided into 25 Cantons which have their own laws on civil procedure). Most cantonal laws on civil procedure recognize an election of jurisdiction by the parties and under the laws of most Cantons the courts have jurisdiction over actions against non-resident defendants, if assets of the defendant have been attached within the territory (e.g., Zurich § 10 II, Geneva § 57 e). Furthermore the laws of many Cantons provide that their courts may have jurisdiction also under other special conditions such as the following:

- (a) In cases of foreign individuals or companies having a "place of business" in Switzerland, most Cantons grant jurisdiction to the court at the location of this "place of business" with respect to claims related to the activities of such "place of business" (e.g., Zurich § 2 No. 6).



(b) Practically all Cantons admit the jurisdiction of the court at the "place of abode" of an individual who has no domicile. In some Cantons the condition that the defendant has no domicile is interpreted as "no domicile in Switzerland".

(c) Some Cantons (e.g., Berne § 26, Lucerne § 35, Basle § 4) admit suits based on art. 41 CO at the place where the unlawful act has been committed (*forum delicti commissi*).

(d) Under the laws of a few Cantons (e.g., Geneva § 57) the mere fact that the plaintiff had his residence within the Canton at the time when concluding the agreement on which his claim is based creates jurisdiction for actions against persons residing outside of Switzerland.

8. Normally a non-resident can bring an action before a Swiss Court under the same conditions and in the same manner as a resident. There are, however, a few exceptions to this rule:

(a) The laws of some Cantons provide that in case of an election of jurisdiction by the parties the courts may refuse to accept the case unless at least the plaintiff has its residence or its registered office within the Canton (e.g., Zurich § 16).

(b) Under the laws of most Cantons a non-resident plaintiff may be requested to make a deposit for litigation expenses, even in cases where such a deposit cannot be requested from a plaintiff residing in Switzerland.

9. The laws which would be applied by a Swiss Court would depend on the cause on which the action is based:

(a) An action based on fault would be subject to the law of the place of the damaging action (lex loci delicti commissi), but under the prevailing Swiss theory not only the place where the action was committed, but also the place where the action had its effect would be considered as locus delicti commissi. Consequently the plaintiff would be entitled to choose between the laws of the place where the prospectus was issued and the laws of the place where he took notice of the prospectus and gave the order to purchase Common Shares of I.O.S. Ltd.

(b) An action based on liability for defects of assets sold would in the absence of special circumstances be governed by the laws of the country where the seller had its residence or its principal office.

(c) An action based on liability for the issuance of a prospectus would normally be governed by the laws of the country under the laws of which the corporation was incorporated. If this law should not give adequate protection, the court would either apply analogously Swiss law on the liability for the issuance of a prospectus for a Swiss company (art. 752 CO) or revert to the general provisions of Swiss law (art. 41 CO if there is no contractual relation between the parties, or art. 197 CO if a contractual relation exists).



(d) The question of whether or not an action under any of the three above mentioned causes is barred by the statute of limitations would be decided by a Swiss Court according to the laws of the country which govern the claim as such.

It should be noted that according to the laws on civil procedure of most Swiss Cantons a court may assume that the applicable foreign law is identical with Swiss law, if foreign law would be applicable and if the parties have not submitted to the Swiss Court satisfactory evidence for the contents of the applicable foreign law (e.g., Zurich § 100, sec. 2).

10. If the present action is maintained as a class action on behalf of all purchasers of Common Shares of I.O.S. Ltd. in the 1969 offerings and if it results in a judgment against this class in favour of the defendants, in the event a class member were to institute a new action in Switzerland against some or all of the same defendants, a defendant may request that the Swiss Court "recognize" this judgment as having effect also in Switzerland so as to bar the new action by the class member. Whether a Swiss Court would recognize the judgment as a bar to the new action is a question which to my knowledge has not yet been decided by a Swiss Court, since in Switzerland there is no kind of procedure available which would be comparable to the U.S. class action procedure.

11. Each Swiss Canton has enacted its own rules concerning the recognition and enforcement of foreign judgments. These rules apply with respect to the judgment of courts in all countries which have not concluded a convention with Switzerland concerning the mutual recognition and enforcement of judgments; they also apply to

the recognition and enforcement of judgments of U.S. courts.

While the conditions under which the foreign judgments are recognized or enforced differ from Canton to Canton, there is an accepted rule that recognition or enforcement of foreign judgments is excluded if it is incompatible with Swiss public policy. A foreign judgment is considered as being contrary to Swiss public policy not only if the decision on the merits is contrary to fundamental rules of Swiss law, but also if the decision was based on a procedure in which rights of the parties were violated which in Switzerland are considered as fundamental.

12. I am of the opinion that a Swiss Court would consider a class action procedure with respect to a member of the class who has not at the outset "opted in", i.e., who has not signed and returned a written document agreeing to be bound in this action, as contrary to Swiss public policy regardless of whether the notice given him was by publication or by direct individual notification. This follows from two basic principles of Swiss law and Swiss civil procedure, namely

(a) the rule that a court shall act only upon request of the parties (so-called "Dispositionsmaxime", "ne procedat iudex ex officio") and that consequently a plaintiff has the right to decide when, where and how -- within the framework of applicable law -- he wishes to bring his action.

(b) The basic right of the parties under all the Swiss laws on civil procedure to be heard ("Recht auf rechtliches Gehör"), which is



considered an emanation from the constitutional provision that "all Swiss are equal before the law" (art. 4 of Federal Constitution).

I am, therefore, of the opinion that a Swiss Court would not recognize a judgment in favour of the defendants in this action as a bar to a new action by a class member who had not opted in.

13. If prospective members of the class were required to opt in in order to become members of the class it is uncertain whether a Swiss Court would recognize a judgment adverse to the class as a bar to a new action.

(a) A judgment in this case could constitute a bar to a new action only if the rejected claim and the claim asserted with the new action are "identical", i.e., based on the same facts. While it is likely that a Swiss Court would consider any claim by a class member which is based on the incorrect statements in the prospectus against a defendant in this case as identical with the claim asserted in this case, this cannot be predicted with certainty since under Swiss law the "res iudicata" doctrine applies only to the final conclusions of the court, i.e., the finding that the claim of the plaintiff in such and such an amount existed or did not exist. Under Swiss law the Swiss Court is not bound by any findings of fact of the U.S. court, even though they were essential for the decision.

(b) It could be argued that even a class member who has "opted in" did not have the full

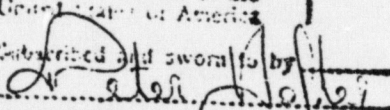
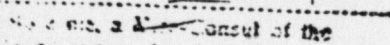
161A-41

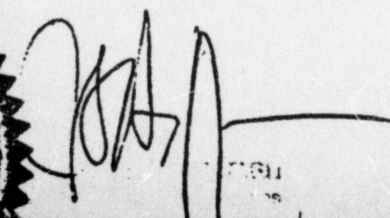
rights of a party in this action including the right to choose his own counsel, the right to participate in pre-trial proceedings and the right to appeal.

However, the merits of this argument would in my opinion be rather moderate since before "opting in" a prospective class member was free to inquire about his right under the class action procedure. It is, therefore, likely that the act of "opting in" would under normal circumstances be considered as accepting the limitation of procedural rights in a class action.

I am, therefore, of the opinion that the defence that a judgment in this case in favour of the defendants should be recognized as a bar to a new action by a member of the class who has opted in, would have certain legal merits before a Swiss Court.

  
PETER HAFTER

Confederation of Switzerland  
Canton and City of Zurich  
Consulate General of the  
United States of America  
Subscribed and sworn to by  
  
I am, a  Consul of the  
United States of America in and for the  
Canton and City of Zurich, Switzerland  
84- Oct 27 1984





161 A-42

**Affidavit of Jacques H. Warmelink in Support of Motion to  
Dismiss, Exhibit D Annexed to Drexel, Firestone Motion**

United States District Court  
Southern District of New York

-----X

Howard Bersch, :  
 :  
 : plaintiff, : 71 civ. 5375 (sjr)  
 :  
 : - against - :  
 :  
 : Drexel Firestone, inc., et al., : affidavit  
 :  
 : defendants. :  
 :  
 : -----X

The Netherlands, City of Amsterdam )  
Embassy of the United States of America ) ss.:

Jacques Henri Warmelink , being duly sworn, says:

1. I am a partner in the partnership of Pierson, Heldring and Pierson ("Pierson, Heldring"), one of the defendants in the above entitled action. I make this affidavit in support of the motion of Pierson, Heldring to dismiss the plaintiff's complaint for lack of personal jurisdiction over it.

2. I have been a partner at Pierson, Heldring since 1st January 1969. I am familiar with the facts concerning the partnership's participation in the underwriting of 5,600,000 shares of newly issued I.O.S. Ltd. common stock in September 1969 as well as the firm's other business operations for the same time period relevant to this suit.

3. Pierson, Heldring is a merchant banking house and has its principal offices at Herengracht 214, Amsterdam, The Netherlands. It has no offices in the United States, nor are there any subsidiaries of Pierson, Heldring which have offices or do business in the United States.

4. From even prior September 1, 1969 and continuing to date, Pierson, Heldring did not transact any business in the United States. From time to time from our offices outside the United States, Pierson, Heldring has arranged for the executions of securities transactions on the United States market by American brokers. However, this arrangement did not entail the performance of any activities by Pierson, Heldring within the United States.

5. In 1969, Pierson, Heldring was invited to participate and did participate as one of six managing underwriters for an offering of newly issued I.O.S. common stock. The remaining managing underwriters were: Drexel Firestone, Inc., Smith Barney & Co. Incorporated, Banque Rothschild, Hill Samuel & Co. Limited, and Guinness Mahon & Co. Limited.

161A-43

6. All of Pierson, Heldring's work on this underwriting was performed completely outside the United States.

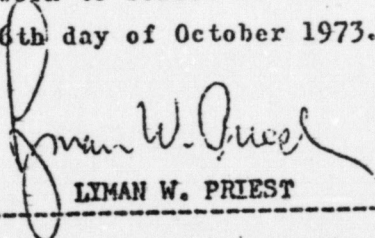
7. As a prerequisite to participation in the offering, Pierson, Heldring agreed not to offer or sell I.O.S. common stock to United States citizens, partnerships or corporations, or to make any offers or sales in the United States (section 3 of the Agreement among Underwriters). The same commitment was undertaken by each underwriter and dealer who took part in the Drexel Group offering.

8. According to our records of sales to retail customers, and to the best of our knowledge, no offers or sales were made in the United States, or to any United States persons or business entities. Furthermore, according to our records and knowledge, the citizenship and territorial restrictions described above have not been violated by any of the participating underwriters and dealers who participated in the offering.



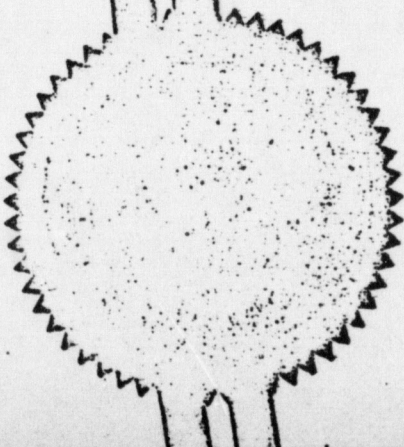
Ki the Netherlands  
 Pr North Holland (Noord-Holland)  
 Co Amsterdam  
 Ca General of the United States of America } SS

Sworn to before me this  
 26th day of October 1973.



LYMAN W. PRIEST

Consul of the United States  
 of America,  
 at Amsterdam, The Netherlands





162 A

**Affidavit of Peter G. Gallichan in Support of Motion to Dismiss,  
Exhibit E Annexed to Drexel, Firestone Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
HOWARD BERSCH, :

PLAINTIFF, :

71 CIV 5373

*My Ross*

- against - :

DREXEL FIRESTONE, INC., ET AL., :

AFFIDAVIT

DEFENDANTS. :  
-----X

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND )

LONDON, ENGLAND )

) SS.::

EMBASSY OF THE UNITED STATES OF AMERICA )

PETER GRANDIN GALLICHAN of 27 Grassmount, London, S.E.23,  
being duly sworn, says:

1. I am a Director of Hill Samuel & Company Limited  
("Hill Samuel"), one of the Defendants in this action. I  
make this Affidavit in support of the Motion of Hill Samuel  
to Dismiss the Complaint for Lack of Personal Jurisdiction.

2. I have served as Director from March 31, 1969, to  
present and am familiar with the facts surrounding Hill  
Samuel's participation in the underwriting of 5,600,000  
shares of newly issued I.O.S. Ltd. ("I.O.S.") Common Stock  
in September, 1969. I am also familiar with the general  
business conducted by Hill Samuel during the time period  
relevant to this suit.

./.

3. Hill Samuel is a merchant banking firm, incorporated in Great Britain, and has its principal offices located at 100 Wood Street, London, England. Hill Samuel has no offices in the United States.
4. From even prior to September 1, 1969, and continuing to the present, Hill Samuel has transacted no business in the United States. Although it did occasionally arrange from its offices in Great Britain for execution of securities transactions on the American market by United States brokers for its customers, no activities related to these transactions were undertaken in the United States by Hill Samuel. Additionally, these transactions had no connection whatsoever with the I.O.S. offering.
5. Hill Samuel owns all the shares of Hill Samuel, Inc., a holding company which in turn owns all the shares of Hill Samuel Securities Corporation, a dealer in securities. Both companies maintain offices in New York City, as does an affiliated company, Lambert Hammond (U.S.A.) Inc., which is a general insurance broker. None of these companies had any involvement in the I.O.S. underwriting, and none is an agent of Hill Samuel or authorized to accept service of process in its behalf. Indeed, Plaintiff did not even purport to serve process on Hill Samuel via any of these companies but rather attempted to effect service in London.
6. In 1969, Hill Samuel participated in an offering of I.O.S. Common Stock as one of six managing underwriters. The remaining five members of this group were: Drexel Firestone, Inc., Smith, Barney & Co. Inc., Banque Rothschild, Guinness Mahon & Co. Ltd. and Pierson, Haldring and Pierson.
7. The efforts and activity which Hill Samuel devoted to this offering were performed entirely outside the United States. ./.



8. As a prerequisite to participation in this offering, Hill Samuel agreed not to offer or sell I.O.S. Stock to United States persons, partnerships or corporations or to make offers or sales inside the United States (Section 3 of the Agreement among underwriters). These restrictions, in fact, were accepted by all underwriters and dealers who participated in the offering.

9. According to our retail sales records, and to the best of my knowledge, no offers or sales were made by Hill Samuel in contravention of the agreed upon citizenship and territorial restrictions. So far as I am aware, none of the underwriters or dealers who participated in this offering made offers or sales violative of the restrictions described above.

*P. G. Yellachan*

*Peter Yellachan*

SWORN TO BEFORE ME THIS

*7<sup>th</sup>* DAY OF

1973.

*[Signature]*  
VICE CONSUL OF THE UNITED  
STATES OF AMERICA AT LONDON,  
ENGLAND.

165 A  
Affidavit of Hugh M. Sassoon in Support of Motion to Dismiss,  
Exhibit F Annexed to Drexel, Firestone Motion

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

HOWARD BERSCH,

PLAINTIFF,

- against -

DREXEL FIRESTONE, INC., ET AL.,

DEFENDANTS.

*Mr. Sass*  
71 CIV 5373 (SJR)

AFFIDAVIT

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND )  
LONDON, ENGLAND )

SS.:

EMBASSY OF THE UNITED STATES OF AMERICA )

HUGH MEYER SASSOON of 33 Chester Square, London, S.W.1.,  
being duly sworn, says:

1. I am a Director of Guinness Mahon & Company Limited ("Guinness Mahon"), one of the Defendants in the above-entitled action. I make this Affidavit in support of the Motion of Guinness Mahon to Dismiss the Complaint for Lack of Personal Jurisdiction over it.
2. I have held the position of Director since February 1, 1967, and am familiar with the circumstances of Guinness Mahon's participation in the underwriting of 5,600,000 shares of newly issued I.O.S. Ltd. ("I.O.S.") Common Stock in September, 1969. Additionally, I am familiar with the general affairs of Guinness Mahon for the time period relevant to this suit.
3. Guinness Mahon is a merchant banking firm, incorporated



under the laws of Great Britain, with Headquarters offices located at 3, Gracechurch Street, London, England. Guinness Mahon has never maintained an office in the United States.

4. From prior to September 1, 1969, and continuing to the present, Guinness Mahon has not transacted any business in the United States. From our offices in the United Kingdom, Guinness Mahon does arrange from time to time for the execution of securities transactions in the United States by American brokers for some of its clients. However, these arrangements have never necessitated a business activity within the United States, nor were they related in any way to the I.O.S. underwriting.

5. A subsidiary of Guinness Mahon, Guinness Mahon Representation Co., Inc., has maintained an office in New York City for a number of years. It does not, however, transact any business in the United States and serves only as a communications convenience. It is not an agent of Guinness Mahon or otherwise authorized to accept service of process on Guinness Mahon's behalf, nor did Plaintiff purport to effect service of process on Guinness Mahon via this entity, nor was this subsidiary in any way connected with the I.O.S. underwriting.

6. In 1969, Guinness Mahon was invited to participate and accepted the position as one of six managing underwriters for an offering of 5,600,000 shares of I.O.S. Common Stock. The remaining managing underwriters were: Drexel Firestone, Inc., Smith Barney & Co. Inc., Banque Rothschild, Hill Samuel & Co. Ltd., and Pierson, Hildring and Pierson.

7. All work on the offering done by Guinness Mahon was accomplished completely outside the United States.

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- 3 -

8. As a prerequisite to participation in the offering, Guinness Mahon agreed not to offer or sell I.O.S. Common Stock to United States citizens, partnerships or corporations, or to make any offers or sales in the United States (Section 3 of the Agreement among underwriters). The same commitment was undertaken by each underwriter and dealer who took part in the offering.

9. According to our records of sales to retail customers, and to the best of our knowledge, Guinness Mahon did not make any offers or sales in the United States, or to United States persons or business entities. Moreover, according to our records and knowledge, there has not been an offer or sale in violation of the restrictions by any of the underwriters and dealers who participated in the offering.

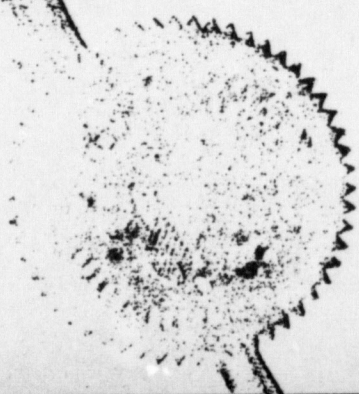
Guinness Mahon

SWORN TO BEFORE ME THIS

7<sup>th</sup> DAY OF        1973.

Michael J. Kelly

VICE CONSUL OF THE UNITED STATES  
OF AMERICA AT LONDON, ENGLAND.





**PROSPECTUS**

168 A

Excerpts from Drexel Prospectus

**INVESTORS OVERSEAS SERVICES****I.O.S., Ltd. 5,600,000 Common Shares**

Certificates for the Common Shares will be issued and transferred only in registered form until the close of business on November 29, 1969. Thereafter, if requested by the holder, the Common Shares may be exchanged free of charge for Bearer Share Warrants which may be transferred by delivery.

Prior to this offering there has been no market for the Company's Common Shares. Application has been made to list the Common Shares on the Montreal and Toronto Stock Exchanges. Acceptance of listing is subject to the filing of required documents and evidence of satisfactory distribution, both within 90 days. The Common Shares will be called for trading on these exchanges 90 days following termination of the offering provisions in the Agreement Among Underwriters entered into in connection with this offering. Application has been made to list the Common Shares on the Luxembourg Stock Exchange and the required notice of listing will be published in the Luxembourg Official Gazette on October 4, 1969. A listing application will also be filed with the Amsterdam Stock Exchange.

	Offering Price	Underwriting Discounts	Proceeds to Company
Per Share.....	U.S. \$10.00	\$0.325	\$9.675
Total.....	U.S. \$56,000,000	\$1,820,000	\$54,180,000

In addition to the underwriting discounts shown above, the Company is paying management fees to the Underwriters' Representatives named below and estimated expenses of the offering, which together amount to approximately U.S.\$0.38 per share. The total management fees are U.S.\$1,400,000 and the total expenses incurred in connection with this offering, including the out-of-pocket costs of the Underwriters, other than their counsel fees, are estimated at U.S.\$714,000.

The Common Shares offered by this prospectus are not registered under the United States Securities Act of 1933 and are not being offered in the United States of America or any of its territories or possessions or any areas subject to its jurisdiction (the "United States") or in Canada or Mexico; or to nationals or citizens of or persons resident or normally resident in the United States or to certain other persons and organizations described under "Underwriting". In addition, such Common Shares are not being offered in this offering to directors, officers, full-time employees or sales personnel of I.O.S., Ltd., its subsidiaries or affiliates or their immediate families.

*The Common Shares are offered, subject to prior sale, when, as and if issued by the Company and accepted by the Underwriters and subject to the approval of certain legal matters by counsel for the Underwriters, and to the satisfaction of certain other conditions. It is expected that the Common Shares will be delivered to the Underwriters on or about October 15, 1969 at The Bank of New York, 147 Leadenhall Street, London E.C.3, England.*

**DREXEL HARRIMAN RIPLEY**INCORPORATED**BANQUE ROTHSCHILD****GUINNESS MAHON & Co. LIMITED****HILL SAMUEL & Co. LIMITED****PIERSON, HELDRING & PIERSON****SMITH, BARNEY & Co.**INCORPORATED

September 24, 1969

# 169 A

IOS, Ltd., a company incorporated under the laws of Canada ("IOS"), is primarily a holding company. For simplicity of presentation various activities conducted by IOS and one or more of its subsidiaries or by one or more of such subsidiaries are referred to as activities of the "Company" in this prospectus, unless identification of the particular subsidiary or subsidiaries is required for clarity.

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*All monetary amounts in this prospectus are stated in United States dollars unless the contrary is expressly indicated.*

IOS and its subsidiaries are prohibited by Canadian law from purchasing any Common Shares of IOS. This restriction does not pertain to the selling shareholders referred to under "Other Offerings" and there can be no assurance that they will not purchase Common Shares at any time.

In connection with this offering, the Underwriters may over-allot or effect transactions which stabilize or maintain the market price of IOS Common Shares at a level above that which might otherwise prevail in the open market. Such stabilizing, if commenced, may be discontinued at any time. In addition, over-allotment and stabilization may independently take place in connection with the offering in Canada referred to under "Other Offerings".

No dealer, salesman or other person has been authorized to give any information or to make any representation in connection with this offering other than those contained in this prospectus and, if given or made, no such information or representation should be relied upon as authorized by the Company or by any of the Underwriters. This prospectus does not constitute an offer to sell or a solicitation of an offer to buy any IOS Common Shares in any jurisdiction to any persons to whom it is unlawful to offer the Common Shares. The English language version of this prospectus shall control any questions arising from its translation into other languages.



## 170 A THE COMPANY

The Company is an international sales and financial service organization principally engaged in the sale and management of mutual funds and complementary financial activities, including: (a) investment and commercial banking, providing financial services, among others, in connection with the purchase and carrying of mutual fund shares; (b) sales and management of real estate investments and properties; and (c) life insurance, principally equity related policies and mutual fund program completion insurance. Consolidated net income has increased from \$1,683,000 in 1964 to \$14,369,000 in 1968.

In terms of its sales volume, the Company presently is the largest distributor of mutual funds and related equity investment products in the world, and, in terms of assets under management, the largest manager of mutual funds outside the United States. Total net assets of the mutual funds managed by the Company have risen from \$119,668,000 at December 31, 1964 to \$1,821,754,000 at August 31, 1969. At June 30, 1969, about two-thirds of the investments in securities held by Company-managed mutual funds were invested in equity securities of United States corporations, and approximately one-third was invested outside the United States.

The Company attributes its success in large measure to its selling force which is trained in financial planning related to the Company's products and services. The sales force, which now numbers in excess of 13,000, works under close direction and receives an opportunity for equity participation in the Company, as well as sales commissions. The Company employs more than 3,000 executive and administrative personnel to support the sales force and to service its more than 750,000 fund, bank and insurance accounts.

The Company's principal executive offices are at 119, rue de Lausanne, Geneva, Switzerland and the registered office of IOS is located at 800 Dorchester Boulevard West, Montreal, Canada. In addition, the Company maintains more than 200 regional sales, administrative and information offices throughout the free world. The Company had its origin in a mutual fund sales business founded by the Company's chief executive officer, Mr. Bernard Cornfeld, in Paris in 1956. This business was incorporated as a Panamanian corporation in 1960 and expanded to include mutual fund management and other financial activities. The Panamanian corporation was reconstituted as a Canadian corporation during the week commencing June 20, 1969, without change in management.

A diagram showing IOS and its principal subsidiaries appears as Appendix I. A list of defined terms used in this prospectus appears as Appendix II.

### PURPOSE OF ISSUE AND USE OF PROCEEDS

The principal purpose of this offering is to establish a market for IOS Common Shares.

The proceeds to be derived by IOS from this offering are estimated at \$52,066,000, after the payment of the expenses of this issue, and will be invested initially in time deposits or other money market instruments. It is contemplated that the increased working capital will be used to develop and expand the Company's activities, primarily in the banking and insurance areas.

### OTHER OFFERINGS

In addition to the offering made by this prospectus, approximately 490 present IOS shareholders are offering an aggregate of 5,392,000 Common Shares in two other offerings. Of this number, 3,942,000 Common Shares are being offered through Investors Overseas Bank Limited ("IOB"), a bank owned by the Company, to approximately 25,000 persons, including Company employees and sales personnel, certain investors in mutual funds managed by the Company and other persons having continuing business relations with the Company. The remaining 1,450,000 Common Shares are being offered in Canada by a Canadian banking group headed by J. H. Crang & Co. Both offerings are being made at the same offering price as the offering made by this prospectus, and the per share net proceeds to the selling shareholders are equal to \$9.675. The closings of all of the offerings will occur simultaneously.

### DIVIDEND POLICY

It is contemplated by IOS that no cash dividends will be paid to shareholders during the next several years, but that dividends in Common Shares will be declared at least annually. Suitable arrangements will be made by IOS so that holders of Common Shares wishing to dispose of their dividend shares for cash may conveniently do so. IOS intends to continue its past practice of frequently splitting its shares.

## MANAGEMENT OF THE COMPANY

The names, home addresses and principal occupations of the directors and officers of IOS are as follows:

<u>Directors and Officers</u>	<u>Home Address</u>	<u>Company Office Held</u>	<u>Principal Occupation</u>
Count Carl Johan Bernadotte	3, Villa Emile-Bergerat, 92, Neuilly-sur-Seine, France	Director	Chairman, Board of Directors, Sundstrand International Corporation, Paris, France
Martin Montague Brooke	Duxbury House, Chantry View Road, Guildford, Surrey, England	Director	Director, Guinness Mahon & Co. Limited, London, England
Christian Herry Buhl III*	Les Charmettes, Gland, Vaud, Switzerland	Director	Chief Officer of Investment Management Division of Company
Allen Richard Cantor*	Port Choiseul, Rue Marchard, Versoix, Geneva, Switzerland	Executive Vice President and Director	Chief Officer of Company's Sales Organization
Pasquale Chiomenti	98, Viale B. Buozzi, Rome, Italy	Director	Senior Partner, Studio Chiomenti, Attorneys-at-law, Rome, Italy
Bernard Cornfeld*	218, rue de Lausanne, Geneva, Switzerland	President, Chairman of the Board and Director	Chief Executive Officer of Company
Edward Joseph Coughlin, Jr.	4, Place de l'Etrier, Chêne-Bougeries, Geneva, Switzerland	Secretary	Associate General Counsel of Company
Edward Morton Cowett*	Villa Belle Haven, Cologny 1223, Geneva, Switzerland	Executive Vice President and Director	Chief Operating Officer of Company
Harvey Felberbaum	Piazza Monte Savello 30, Rome, Italy	Director	A General Manager of Company's Sales Organization
Richard Gangel*	26 Rutland Gate, London S.W.7, England	Director	A Senior Sales Officer
Kent Gordis**	Grande Coudre, Celigny, Geneva, Switzerland	Vice President	Chief Officer of Company's Computer Processing Facilities
Richard Hammerman*	26 Kingston House South, Ennismore Gardens, London S.W.7, England	Director	Chief Officer of Company's Insurance Organization
Ben Heirs**	27, chemin de Bougeries, Chêne-Bourg, Geneva, Switzerland	Executive Vice President of Financial Holdings	Senior Officer of Company's Banking Organization
Roy Kirkdorffer	Ilchester House, Winnington Road, London N.2, England	Director	Chief Officer of United Kingdom Sales Organization
George Landau*	4, rue des Granges, Geneva, Switzerland	Vice President and Director	Senior Executive of Company responsible for Administration
Jay Francis Leary	53, route de Suisse, Nyon, Vaud, Switzerland	Assistant Secretary	Lawyer
Melvin Lechner	4, Place de l'Etrier, Chêne-Bougeries, Geneva, Switzerland	Treasurer	Chief Financial Officer of Company
Erich Mende	Am Stadtwald, Bad Godesberg, Germany	Director	Senior Executive of Company's German Operations
George von Peterffy	6 Coolidge Hill Road, Cambridge, Mass., U.S.A.	Director	Associate Professor, Harvard Business School
Norman Rolnick	1249 Avully, Geneva, Switzerland	Assistant Treasurer	Comptroller of Company



<u>Directors and Officers</u>	<u>Home Address</u>	<u>Company Office Held</u>	<u>Principal Occupation</u>
James Roosevelt*	Villa Beauvoir, 97, chemin de Ruth, Cologny, Geneva, Switzerland	Director	Chief Officer of Company's Development Organization
Lawrence Rosen	Chemin des Palettes 31, Grand Lancy, Geneva, Switzerland	Assistant Secretary	Officer of Company's Sales Organization
Martin Seligson*	Chemin des Hauts-Crets 19, Cologny, Geneva, Switzerland	Director	Chief Officer of Company's Real Estate Organization
Barry Harman Sterling*	41, Avenue Foch, Paris, France	Director	Chief Officer of Company's Banking Group
Robert Sutner	299 Highland Avenue, Ridgewood, New Jersey, U.S.A.	Director	A Senior Advisor to Company's Sales Organization
George Tregea*	Quai Wilson 43, Geneva, Switzerland	Director	A Senior Officer of Company's Sales Organization
Eli Wallitt*	57, route de Collex, Bellevue, Geneva, Switzerland	Director	A Field Director of Company's Sales Organization
Ira Weinstein	12 Rosemount, Westmount, Quebec, Canada	Director	Chief Officer of Canadian Sales Organization
Sir Eric Wyndham White, K.C.M.G.*	1, Place de la Taconnerie, Geneva, Switzerland	Vice President and Director	A Senior Officer of Company's Development Organization
Wilson Watkins Wyatt	1001 Alta Vista Road, Louisville, Kentucky, U.S.A.	Director	Senior Partner, Wyatt, Grafton and Sloss, Attorneys-at-law, Louisville, Kentucky, U.S.A.

\* Denotes Member of Executive Management Committee (the "Committee"). The by-laws of IOS vest in the Committee all powers of the Board of Directors in the interim between meetings of the Directors, and empower the Committee to take all action that might be taken by the Board. The Committee is appointed by the Board annually and holds regular meetings at least monthly. All directors who are not specifically appointed to the Committee are invited to attend and vote at all meetings. Mr. Edward M. Cowett is the Chairman of the Committee.

\*\* Denotes ex-officio, non-voting member of the Committee.

All persons listed above have been in their present principal occupation for the past five years except that the following persons had occupations as indicated below prior to joining the Company:

Count Carl Johan Bernadotte has also been Chairman of the Board of Directors of Sundstrand Hydraulic AB since 1954;

Edward Joseph Coughlin, Jr. was associated with Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, Attorneys-at-law, New York;

Jay Francis Leary was associated with Willkie Farr & Gallagher, Attorneys-at-law, New York;

Melvin Lechner was associated with Arthur Andersen & Co., Independent Public Accountants, New York;

Dr. Erich Mende is a member of the Bundestag and was formerly Vice-Chancellor of Germany;

James Roosevelt was a member of the United States House of Representatives as well as the permanent United States Representative to Committee II of the United Nations;

Martin Seligson was President and a Director of Atlantic Improvement Corporation, New York;

Barry Harman Sterling was a senior partner of Hindin, Sterling, McKittrick & Powsner, Attorneys-at-law, Los Angeles, California; and

Sir Eric Wyndham White was Director-General of The General Agreement on Tariffs and Trade (GATT).

At September 1, 1969 the officers and directors owned an aggregate of 40% of the Preferred Shares including 17% owned by Bernard Cornfeld. After giving effect, as of that date, to this and to the offerings referred to under "Other Offerings", the percentages will be 37% and 15%, respectively.



\* \* \*

**PROPERTY**

Listed below are the Company's principal executive, administrative, banking and insurance offices at July 31, 1969:

<u>Location and Description</u>	<u>Owned or Leased</u>	<u>Net Annual Rental</u>	<u>Expiration of Leases</u>	<u>Approximate Gross Area in Square Meters</u>
Geneva, Switzerland				
Executive Offices <sup>1</sup> :				
119, rue de Lausanne and adjoining premises at 2-4, Avenue Sécheron	Leased	S.Fr. 441,892	1975	4,673
Administrative Offices:				
16, Chemin de la Voie Creuse	Leased	S.Fr. 316,373	1972	2,735
Conference and training facilities:				
Bella Vista	Owned			900
Banking Offices <sup>2</sup> :				
40 and 23, rue du Rhône and adjacent offices; 121, rue de Lausanne	Leased	S.Fr. 578,320	1972-74	2,700
Nyon, Switzerland <sup>3</sup>				
Data Processing Facility	Leased	S.Fr. 120,000	1972	2,000



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<u>Location and Description</u>	<u>Owned or Leased</u>	<u>Net Annual Rental</u>	<u>Expiration of Leases</u>	<u>Approximate Gross Area in Square Meters</u>
<b>Ferney-Voltaire, France<sup>4</sup></b>				
Administrative Offices	Owned			16,000
<b>England</b>				
Executive offices <sup>5</sup> :				
Park House, Park Street, London W.1	Leased	£11,000	1978	476
Portland House, Stag Place, London S.W.1	Leased	£92,000	2058	2,111
Administrative Offices:				
Wembley Park, Middlesex	Leased	£61,200	2009	5,600
<b>Canada</b>				
Administrative and Sales Offices:				
Montreal	Leased	Cdn. \$104,714	1975-77	2,037
Toronto	Leased	Cdn. \$39,669	1974	1,244
<b>Luxembourg<sup>6</sup></b>				
Banking Office	Leased	Lux. Fr. 264,000	1971	320
<b>Germany</b>				
Administrative offices of I.O.S. in Deutschland GmbH:				
Munich	Leased	DM 294,852	1970-71	3,931
Bad Godesberg	Leased	DM 54,000	1971	170
Banking Offices:				
Munich	Leased	DM 59,400	1972	755
Frankfurt	Leased	DM 110,340	1974	285
Dusseldorf	Leased	DM 49,368	1972	242
Data processing				
Munich	Leased	DM 386,964	1972	3,000
<b>Italy</b>				
Administrative office of Fideuram:				
Rome	Leased	\$61,000	1970-74	3,313
Banking Office:				
Milan	Owned			1,500

(<sup>1</sup>) The Company has an option to purchase the capital stock of a company owning the building at 119, rue de Lausanne and 2-4, Avenue de Sécheron. The Company has leased 2,200 square meters for additional executive offices in a new building at 143, 145, and 147, rue de Lausanne. Occupancy is scheduled for October 1969. In addition, the Company is constructing a new office building at 1, Avenue de la Paix adjacent to the new rue de Lausanne leased space. At estimated completion in September 1970, the building will have 5,660 square meters of gross space.

(<sup>2</sup>) ODB has agreed to purchase property on the Quai du Mont Blanc in Geneva. It is contemplated that a new bank building will be housed on this site.

(<sup>3</sup>) The Company has contracted for the construction of a new data processing center in Nyon. First stages of this building are scheduled for completion beginning October 1970.

(<sup>4</sup>) These buildings are legally classified as "temporary" by the French government. Construction has begun on a permanent building, estimated to be completed in 1971.

(<sup>5</sup>) The Company has acquired a leasehold interest in a building located at 25-27 North Row, London W.1. The building comprises a total of 2,143 square meters and the lease expires on March 25, 1994. The annual rental is £25,000 per annum.

(<sup>6</sup>) The Company has contracted for the purchase of a building at 18, Avenue de la Liberté, Luxembourg. The building has 1,200 square meters of gross space and its cost is approximately \$300,000. The anticipated occupancy is Spring 1970.

The Company's present executive offices in Geneva and its data processing center in Nyon are located in former residential apartment complexes which have been converted into business facilities. The completion of the new buildings described in the footnotes above should make the Company's administrative operations more efficient and convenient by centralizing facilities which are now at different locations in and near the city of Geneva.



### UNDERWRITING

Subject to the terms and conditions of the Underwriting Agreement, dated September 24, 1969, the Underwriters named below have severally agreed to purchase, and IOS has agreed to sell to them, severally, the respective numbers of Common Shares set forth below:

Name	Number of Common Shares	Name	Number of Common Shares
Drexel Harriman Ripley, Incorporated.....	478,000	Banque de l'Union Parisienne C.F.C.B.....	38,000
Banque Rothschild.....	330,000	Banque Worms et Cie.....	38,000
Guinness Mahon & Co. Limited.....	330,000	La Compagnie Financière.....	38,000
Hill Samuel & Co. Limited.....	330,000	Crédit Commercial de France.....	38,000
Pierson, Heldring & Pierson.....	330,000	Finacor.....	26,000
Smith, Barney & Co. Incorporated.....	330,000	Pinto & Co. (International) Inc.....	26,000
<i>Australia</i>		<i>Germany</i>	
Ord-B.T. Co. Limited.....	26,000	Allgemeine Bankgesellschaft Aktiengesellschaft.....	26,000
<i>Bahamas</i>		Allgemeine Deutsche Credit Anstalt.....	26,000
Crédit Suisse (Bahamas) Limited.....	38,000	Bankhaus Gebrüder Bethmann.....	38,000
The Deltec Banking Corporation Limited.....	38,000	Bankhaus Hermann Lampe	
International Credit Bank (Overseas) Ltd.....	26,000	Kommanditgesellschaft.....	38,000
<i>Belgium</i>		Bankhaus Preusker & Thelen.....	26,000
Banque Lambert S.C.S.....	38,000	Joh. Berenberg, Gossler & Co.....	38,000
<i>Denmark</i>		Burkhardt & Co.....	38,000
Den Danske Landmandsbank.....	26,000	Merck, Finck & Co.....	38,000
R. Henriques jr.....	26,000	Poensgen, Marx & Co.....	26,000
Kjobenhavns Handelsbank.....	26,000	August Thyssen-Bank Aktiengesellschaft.....	26,000
Privatbanken i Kjobenhavn.....	26,000	<i>Japan</i>	
<i>Finland</i>		The Daiwa Securities Co. America, Inc.....	26,000
Ab Nordiska Föreningsbanken.....	26,000	The Nikko Securities Co. Ltd.....	26,000
Kansallis - Osake - Pankki.....	26,000	The Nomura Securities Co., Ltd.....	26,000
<i>France</i>		Yamaichi Securities Co. Ltd.....	26,000
Banque Européenne de Financement.....	26,000	<i>Luxembourg</i>	
Banque de l'Indochine.....	38,000	Banque Commerciale S.A.....	26,000
Banque Louis-Dreyfus & Cie S.A.....	26,000	Banque Internationale à Luxembourg S.A.....	26,000
Banque de Neufelize, Schlumberger, Mallet.....	38,000	Banque Troillet à Luxembourg S.A.....	26,000
Banque de Suez et de l'Union des Mines.....	38,000	Crédit Industriel d'Alsace et de Lorraine.....	26,000
Banque de l'Union Européenne Industrielle et Financière.....	38,000	Kredietbank S.A. Luxembourggeoise.....	26,000



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Name	Number of Common Shares	Name	Number of Common Shares
<i>The Netherlands</i>		Norris Oakley Richardson & Glover	26,000
Amsterdam-Rotterdam Bank N.V.	38,000	Panmure Gordon & Co.	26,000
Bank Mees & Hope N.V.	38,000	Rea Brothers Limited	26,000
Labouchere & Co. N.V.	26,000	Rodo International Limited	26,000
F. van Lanschot	26,000	Rowe & Pitman	26,000
Nederlandsche Credietbank N.V.	26,000	E. D. Sassoon Banking Company Limited	26,000
Oyens & Van Eeghen N.V.	26,000	J. Henry Schroder Wagg & Co. Limited	38,000
N. V. Slavenburg's Bank	38,000	Joseph Sebag & Co.	38,000
<i>Norway</i>		Singer & Friedlander Ltd.	38,000
Andresens Bank A/S	26,000	Slater, Walker Limited	26,000
Bergens Privatbank	26,000	Strauss, Turnbull & Co.	38,000
Gunnar Bohn & Co. A/S	26,000	Ufitec International Limited	26,000
Christiania Bank og Kreditkasse	26,000	Vickers, da Costa & Co.	26,000
Den norske Creditbank	26,000	Wallace Brothers & Co. (Holdings) Limited	26,000
<i>Sweden</i>		Westminster Bank Limited	38,000
Skandinaviska Banken	38,000	<i>United States</i>	
Svenska Handelsbanken	38,000	Arnhold and S. Bleichroeder, Inc.	26,000
<i>United Kingdom</i>		Bache & Co. Overseas S.A.	26,000
Astaire & Co.	26,000	Bear, Stearns & Co.	26,000
Julius Baer International Limited	38,000	Blyth & Co., Inc.	38,000
Bank of London & South America Limited	38,000	Burnham Securities S.A.	26,000
Barclays Bank Limited	38,000	Clark, Dodge & Co. Incorporated	26,000
Wm. Brandt's Sons & Co. Ltd.	26,000	Delafield & Delafield S.A.R.L.	26,000
British and Continental Banking Company Limited	26,000	Dempsey-Tegeler & Co.	26,000
Brown, Shipley & Co. Limited	26,000	Eastman Dillon, Union Securities & Co.	38,000
Cazenove & Co.	38,000	Emanuel, Deetjen S.A.	26,000
Charterhouse Japhet & Thomasson Limited	26,000	Faulkner, Dawkins & Sullivan Securities Inc.	26,000
Glyn, Mills & Co.	38,000	First Manhattan Co.	26,000
G. S. Herbert & Sons	26,000	Goldman, Sachs & Co.	38,000
The Hong Kong and Shanghai Banking Corporation	26,000	Havenfield Corporation	26,000
P. N. Kemp-Gee & Co.	26,000	Hayden, Stone Incorporated	26,000
Keyser Ullmann Limited	26,000	Hirsch & Co.	26,000
Kitcat & Aitken	26,000	W. E. Hutton Underwriting Ltd.	26,000
Laing & Cruickshank	26,000	Loeb, Rhoades & Co.	38,000
Lloyds Bank Europe Limited	38,000	New York Hanseatic International Ltd.	26,000
London & Dominion Trust U.K. Limited	26,000	R. W. Pressprich & Co. (Overseas) Ltd.	26,000
L. Messel & Co.	26,000	L. F. Rothschild & Co.	26,000
Samuel Montagu & Co. Limited	38,000	Shearson, Hammill & Co. Incorporated	26,000
		Stralem, Saint Phalle Overseas, Inc.	26,000
		Weeden & Co.	26,000
		Dean Witter International Inc.	38,000
			Total 5,600,000

The nature of the Underwriters' obligations is such that all Common Shares must be purchased if any are purchased. The Underwriters' obligations are not contingent on the other offerings described herein.

IOS has agreed to reimburse the Underwriters for all their out-of-pocket expenses other than counsel fees, and IOS and the Underwriters have agreed to indemnify each other against certain liabilities. The Company is also paying the Representatives of the Underwriters an aggregate management fee of \$1,400,000.

IOS has agreed not to offer or sell any Common Shares for a period of 90 days after the date of this prospectus. IOS and its subsidiaries are prohibited by Canadian law from purchasing any Common Shares of IOS. This restriction on purchases does not pertain to shareholders selling in the other offerings and there can be no assurance that they will not purchase Common Shares at any time. IOS has also agreed that none of the mutual funds managed or controlled by it will purchase any Common Shares.

The Underwriters have agreed that they will not directly or indirectly offer, sell or deliver Common Shares in this offering: (i) in the United States; (ii) in Canada or Mexico for a period of six months after the date of this prospectus except for deliveries in Canada solely for the purpose of registration of Common Shares; (iii) to nationals or citizens of or persons resident or normally resident in the United States ("U.S. persons"); (iv) to partnerships or associations any of whose partners or members are U.S. persons ("U.S. partnerships or associations"); (v) to corporations incorporated in, domiciled in or having their principal place of business in the United States or which are controlled by such corporations, U.S. persons, or U.S. partnerships or associations ("U.S. corporations"); or (vi) to others for reoffering, resale or delivery directly or indirectly in the United States, Canada or Mexico or to U.S. persons, U.S. partnerships or associations or U.S. corporations, and that any securities dealer to whom they sell Common Shares will agree that it is purchasing such Common Shares as principal and will not directly or indirectly reoffer, resell or deliver such Common Shares in the United States, Canada or Mexico or to U.S. persons, U.S. partnerships or associations, or U.S. corporations.

A ruling has been obtained from the United States Internal Revenue Service to the effect that United States Interest Equalization Tax will be payable, if, notwithstanding the above agreements, any U.S. person (as defined in the United States Internal Revenue Code) purchases Common Shares in this offering.

The Underwriters have further agreed that they will use their best efforts not to offer, sell or deliver Common Shares to directors, officers, full-time employees or sales personnel of the Company or their immediate families.

Purchasers of Common Shares may be required to pay stamp taxes and other charges in accordance with the laws and practices of the country of purchase, in addition to the offering price.

The Underwriters propose to offer the Common Shares to retail purchasers at the offering price set forth on the cover of this prospectus. The Underwriters have agreed that sales to Selected Dealers by the Representatives of the Underwriters for the accounts of the Underwriters may be at the offering price less a concession not exceeding \$0.15 per share. There will be a reallocation of \$0.05 per share on sales to dealers who are not members of the Selected Dealer group. The Representatives of the Underwriters are authorized to change the offering price, the concession to Selected Dealers and the reallocation at any time after the initial offering.

Banque Rothschild, a Representative of the Underwriters, has entered into an agreement with the Company relating to the sale of securities of an investment company in France. See "Business—Rothschild-Expansion". Guinness Mahon & Co. Limited, a Representative of the Underwriters, of which Martin Brooke is a director, acts as one of the sub-advisors giving portfolio advice to the Company and carries out banking transactions with the Company. The Company is discussing with Drexel Harriman Ripley, Incorporated and Smith, Barney & Co. Incorporated, Representatives of the Underwriters, the appointment of European offices of those firms as sub-advisors. The Company is also discussing a similar appointment with Hill Samuel & Co. Limited, a Representative of the Underwriters. Drexel Harriman Ripley, Incorporated was previously a sub-advisor in 1967.

### EXPERTS

The financial statements of I.O.S., Ltd. and subsidiaries, IOS Financial Holdings Limited and subsidiaries, IOS Real Estate Holdings Limited and subsidiary, and IOS Insurance Holdings Ltd. and subsidiaries, included in this prospectus have been examined by Arthur Andersen & Co., independent public accountants, for the periods indicated in their reports with respect thereto. In such reports that firm states that its opinions are based on the reports of other accountants with respect to certain subsidiaries. Such financial statements are included herein in reliance upon the authority of said firms as experts in giving such reports.

### LEGAL OPINIONS

Legal matters in connection with this offering are being passed upon for the Company by Willkie Farr & Gallagher, New York, in regard to United States law; Zimmerman, Winters, Worley, Grant, Hugo, Paddon & Bennett, Toronto, in regard to Canadian law and Freshfields, London, in regard to English law; and for the Underwriters by Shearman & Sterling, New York, in regard to United States law; Blake, Cassels & Graydon, Toronto, in regard to Canadian law and Allen & Overy, London, in regard to English law. The underwriters have also been advised by counsel with respect to certain matters in regard to the laws of the Bahamas, Belgium, France, Germany, Italy, Luxembourg, Panama, Spain and Switzerland. Reference is made to various law firms named under "Taxation" on whose opinions statements in regard to taxes and dividend distributions are based. Allan F. Conwill, a partner of Willkie Farr & Gallagher, is a director of Investors Overseas Services Management Limited and of The Fund of Funds, Limited.



**APPROVAL OF DIRECTORS AND OFFICERS**

The Executive Management Committee acting pursuant to the By-laws of I.O.S., Ltd., and the following officers of I.O.S., Ltd., have approved this prospectus as accurate and complete and have authorized its use in connection with this offering.

Bernard Cornfeld,  
President and Principal Executive Officer.

Edward M. Cowett,  
Executive Vice President and Principal Operating Officer.

Melvin N. Lechner,  
Treasurer and Principal Financial Officer.

**CONSENT OF INDEPENDENT PUBLIC ACCOUNTANTS**

As independent public accountants, we hereby consent to the use of our reports and to all references to our firm included in or made part of this prospectus.

ARTHUR ANDERSEN & CO.

Zurich, Switzerland,  
September 24, 1969

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**REPORT OF INDEPENDENT PUBLIC ACCOUNTANTS**

To I.O.S., LTD.:

We have examined the consolidated balance sheet of I.O.S., Ltd. [a Canadian corporation and successor, subsequent to the date of this report, to I.O.S., Ltd. (S.A.)] and Subsidiaries as of December 31, 1968, and the related statements of consolidated income and retained earnings (included elsewhere in this prospectus) for the five years then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We did not examine the financial statements of certain subsidiaries but we were furnished with reports of other auditors thereon. The information in Note 1 to the consolidated financial statements with respect to certain subsidiaries is presented on the basis of reports of other auditors.

In our opinion, based upon our examination and the reports of other auditors as referred to above, the above-mentioned financial statements present fairly the financial position of I.O.S., Ltd. and Subsidiaries as of December 31, 1968, and the results of their operations for the five years then ended, in conformity with generally accepted accounting principles applied on a consistent basis after giving retroactive effect to the change explained in Note 1.

ARTHUR ANDERSEN & Co.

Zurich, Switzerland,  
April 15, 1969.

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**REPORT OF INDEPENDENT PUBLIC ACCOUNTANTS**

**TO IOS FINANCIAL HOLDINGS LIMITED:**

We have examined the consolidated balance sheet of IOS Financial Holdings Limited (an English corporation and a wholly-owned subsidiary of I.O.S., Ltd.) and Subsidiaries as of December 31, 1968, and the related statements of consolidated income, retained earnings and legal and special reserves for the three years then ended. The financial statements for all years reflect the acquisition as of June 30, 1969 (subsequent to the date of this report) of Liquidations Limited as discussed in Note 1 to the financial statements. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We did not examine the 1966 and 1967 financial statements of certain subsidiaries but we were furnished with reports of other auditors thereon.

In our opinion, based upon our examination and the reports of other auditors as referred to above, the accompanying financial statements present fairly the financial position of IOS Financial Holdings Limited and Subsidiaries as of December 31, 1968 and the results of their operations for the three years then ended, in conformity with generally accepted accounting principles applied on a consistent basis after giving retroactive effect to the change explained in Note 1.

**ARTHUR ANDERSEN & Co.**

**Zurich, Switzerland,  
April 15, 1969.**



## REPORT OF INDEPENDENT PUBLIC ACCOUNTANTS

TO IOS REAL ESTATE HOLDINGS LIMITED:

We have examined the consolidated balance sheet of IOS Real Estate Holdings Limited (a wholly-owned English subsidiary of I.O.S., Ltd. and successor, subsequent to the date of this report, to Investors Development Corporation Limited) and Subsidiary as of December 31, 1968 and the related statements of consolidated income and retained earnings for the period from commencement of operations (October 1966) to December 31, 1968. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying financial statements present fairly the financial position of IOS Real Estate Holdings Limited and Subsidiary as of December 31, 1968, and the results of their operations for the period from commencement of operations to December 31, 1968 in conformity with generally accepted accounting principles applied on a consistent basis.

ARTHUR ANDERSEN & CO.

Zurich, Switzerland,  
April 15, 1969.

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**REPORT OF INDEPENDENT PUBLIC ACCOUNTANTS**

TO IOS INSURANCE HOLDINGS LTD.:

We have examined the consolidated balance sheet of IOS Insurance Holdings Ltd. (a Canadian subsidiary of I.O.S., Ltd. and successor, subsequent to the date of this report, to The International Life Insurance Company, S.A.) and Subsidiaries as of December 31, 1968, and the related statements of consolidated income and retained earnings for the three years then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included the count or direct confirmation with custodian banks of certificates evidencing investments and related underlying securities, and such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying financial statements present fairly the financial position of IOS Insurance Holdings Ltd. and Subsidiaries as of December 31, 1968, and the results of their operations for the three years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

ARTHUR ANDERSEN & Co.

London, E.C.2,  
April 15, 1969.

## APPENDIX I

## IOS and Principal Subsidiaries

SALES AND  
SALES ADMINISTRATION

INVESTORS OVERSEAS SERVICES LIMITED, Bahamas (Principal sales subsidiary)  
 INTERNATIONAL OVERSEAS SERVICES PTY. LTD., Australia  
 INVESTORS OVERSEAS SERVICES IN WIEN Ges. mbH, Austria  
 INVESTORS OVERSEAS SERVICES (STERLING) LIMITED, Bahamas  
 I.O.S. OF CANADA LTD., Canada  
 INVESTORS OVERSEAS SERVICES (U.K.) LIMITED, England  
 ALTERSINVEST BERATUNGSGESELLSCHAFT FÜR ANLAGEPLANUNG  
 UND ALTERNATIVVERSORGUNG GmbH, Germany  
 INVESTORS OVERSEAS SERVICES IN DEUTSCHLAND GmbH, Germany  
 INVESTORS OVERSEAS SERVICES (H.K.) LIMITED, Hong Kong  
 FIDUCIARIA EUROPEA-AMERICANA, S.p.A., Italy  
 INVESTORS OVERSEAS SERVICES (MIDDLE EAST) S.A.L., Lebanon  
 INVESTORS OVERSEAS SERVICES IOS (LUXEMBOURG) S.A., Luxembourg  
 AGENCIA DE INVESTORS OVERSEAS SERVICES DE PANAMA, S.A., Panama  
 SOCIETE D'INFORMATION I.O.S. (S.A.), Switzerland  
 OTHER COMPANIES (Inactive or in various stages of organization)

## FUND MANAGEMENT

INVESTORS OVERSEAS SERVICES MANAGEMENT LIMITED, Canada  
 77% owned (Owner of the following companies):  
 FOF MANAGEMENT COMPANY LIMITED, England  
 (Investment Advisor to The Fund of Funds, Limited)  
 I.I.T. MANAGEMENT COMPANY S.A., Luxembourg  
 (Investment Advisor to IIT, an International Investment Trust)  
 CANADIAN FUND MANAGEMENT COMPANY LIMITED, England  
 (Investment Advisor to I.O.S. Regent Fund Ltd.)  
 FONDITALIA MANAGEMENT COMPANY S.A., Luxembourg  
 (Investment Advisor to Fonditalia)  
 VENTURE MANAGEMENT COMPANY LIMITED, Bahamas  
 (Investment Advisor to IOS Venture Fund (International) N.V.)  
 IPI MANAGEMENT COMPANY LIMITED, England  
 (Investment Advisor to Investment Properties International, Limited)  
 INVESTORS FONDS KAPITALANLAGEGESELLSCHAFT mbH, Germany—99%  
 owned (Investment Advisor to Investors Fonds)  
 IOS DEVELOPMENT COMPANY LIMITED, England  
 (Owner of the following companies):  
 I.O.S. STERLING MANAGEMENT COMPANY LIMITED, Bahamas  
 (Investment Advisor to The Fund of Funds Sterling Limited)  
 I.V.M. INVEST MANAGEMENT COMPANY LIMITED, Bahamas  
 (Investment Advisor to I.V.M. Invest N.V.)  
 I.O.S. MANAGEMENT COMPANY LIMITED, Bahamas  
 (Investment Advisor to I.O.S. Venture Fund Ltd.)  
 REGENT FUND ADVISERS (1963) LTD., Canada  
 (Sub-advisor to I.O.S. Regent Fund Ltd., and to I.O.S. Venture Fund Ltd.)  
 OTHER COMPANIES (Managing non-public funds or in various stages of organization)

## INSURANCE

IOS INSURANCE HOLDINGS LTD., Canada—78% owned  
 (Owner of the following companies):  
 THE INTERNATIONAL LIFE INSURANCE COMPANY, S.A., Luxembourg  
 THE INTERNATIONAL LIFE INSURANCE COMPANY (U.K.) LIMITED,  
 England  
 THE INTERNATIONAL LIFE INSURANCE COMPANY (MALTA) LIMITED,  
 Malta  
 THE INTERNATIONAL REINSURANCE COMPANY LIMITED, Bahamas  
 "I.V.M." (DE INTERNATIONALE VERZEKERING MAATSCHAPPIJ) N.V.,  
 Netherlands  
 OTHER COMPANIES (Inactive or in various stages of organization)

BANKING AND  
FINANCIAL COMPANIES

IOS FINANCIAL HOLDINGS LIMITED, England  
 (Owner of the following companies):  
 OVERSEAS DEVELOPMENT BANK, Switzerland  
 ORBIS BANK GmbH, Germany—90% owned  
 INVESTORS BANK LUXEMBOURG, S.A., Luxembourg  
 INVESTORS OVERSEAS BANK LIMITED, Bahamas  
 IOS ACCEPTANCE COMPANY LIMITED, Bahamas  
 FINANCIAL INSTITUTIONS MANAGEMENT N.V., Netherlands Antilles  
 IOS ENTERPRISES LIMITED, England  
 OVERSEAS DEVELOPMENT BANK (BAHAMAS) LIMITED, Bahamas  
 OVERSEAS DEVELOPMENT BANK (STERLING) LIMITED, Bahamas  
 BANCA PROVINCIALE DI DEPOSITI E SCONTI S.p.A., Italy—96% owned  
 OTHER COMPANIES (Inactive or in various stages of organization)

## REAL ESTATE

IOS REAL ESTATE HOLDINGS LIMITED, England  
 (Owner of the following companies):  
 INVESTORS DEVELOPMENT CORPORATION LIMITED, Bahamas  
 PROPERTY MANAGEMENT S.A., Spain  
 PROPERTY MANAGEMENT LIMITED, Bahamas  
 INDEVCO MANAGEMENT CORPORATION, N.V., Netherlands Antilles  
 IOS ENGINEERING AND CONSTRUCTION COMPANY LIMITED, Bahamas  
 OTHER COMPANIES (Inactive or in various stages of organization)

## ADMINISTRATIVE

I.O.S. ADMINISTRATIVE S.A., Switzerland  
 SERVICES ADMINISTRATIFS IOS FRANCE S.A., France

## OTHER COMPANIES

I.I.T. MANAGEMENT COMPANY LIMITED, Bahamas (Publisher of investment  
 advisory service)  
 INTERNATIONAL SCIENTIFIC SYSTEMS LIMITED, Bahamas (Computer service  
 company)  
 FRONTIERS PUBLISHING COMPANY LIMITED, Bahamas (General Publisher)

I.O.S., LTD.



**PROSPECTUS**

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Excerpts from IOB Prospectus

**INVESTORS OVERSEAS SERVICES****I.O.S., Ltd. 3,950,000 Common Shares**

Certificates for the Common Shares will be issued and transferred only in registered form until the close of business on November 29, 1969. Thereafter, if requested by the holder, the Common Shares may be exchanged free of charge for Bearer Share Warrants which may be transferred by delivery.

Prior to this offering there has been no market for the Company's Common Shares. Application has been made to list the Common Shares on the Montreal and Toronto Stock Exchanges. Acceptance of listing is subject to the filing of required documents and evidence of satisfactory distribution, both within 90 days. The Common Shares will be called for trading on these exchanges 90 days following termination of the offering provisions in the Agreement Among Underwriters entered into in connection with this offering. Application has been made to list the Common Shares on the Luxembourg Stock Exchange and the required notice of listing will be published in the Luxembourg Official Gazette on October 4, 1969. A listing application will also be filed with the Amsterdam Stock Exchange.

	Offering Price	Commission	Proceeds to Selling Shareholders
Per Share.....	U.S. \$10.00	\$0.50	\$9.50
Total.....	U.S. \$39,500,000	\$1,975,000	\$37,525,000

The Common Shares offered by this prospectus are not registered under the United States Securities Act of 1933 and are not being offered in the United States of America or any of its territories or possessions or any areas subject to its jurisdiction (the "United States") or in Canada or Mexico.

The Common Shares of I.O.S., Ltd. are being offered to the public through three separate offerings: one managed by Investors Overseas Bank Limited, a subsidiary of the Company; one in Canada, managed by a Canadian banking group; and one principally in Europe, managed by an international banking syndicate. This prospectus relates to the offering managed by Investors Overseas Bank Limited. This offering is being made to approximately 25,000 persons who are either (1) employees or sales associates of the Company, (2) certain clients presently holding investments in managed funds or other products of the Company, or (3) persons who have had a long-standing professional or business relationship with the Company.

**INVESTORS OVERSEAS BANK LIMITED**

Nassau, the Bahamas

September 24, 1969

I.O.S., Ltd., a company incorporated under the laws of Canada ("IOS"), is primarily a holding company. For simplicity of presentation various activities conducted by IOS and one or more of its subsidiaries or by one or more of such subsidiaries are referred to as activities of the "Company" in this prospectus, unless identification of the particular subsidiary or subsidiaries is required for clarity.

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All monetary amounts in this prospectus are stated in United States dollars unless the contrary is expressly indicated.

No dealer, salesman or other person has been authorized to give any information or to make any representation in connection with this offering other than those contained in this prospectus and, if given or made, no such information or representation should be relied upon as authorized by the Company. This prospectus does not constitute an offer to sell or a solicitation of an offer to buy any IOS Common Shares in any jurisdiction to any persons to whom it is unlawful to offer the Common Shares. The English language version of this prospectus shall control any questions arising from its translation into other languages.





#### EXPERTS

The financial statements of I.O.S., Ltd. and subsidiaries, IOS Financial Holdings Limited and subsidiaries, IOS Real Estate Holdings Limited and subsidiary, and IOS Insurance Holdings Ltd. and subsidiaries, included in this prospectus have been examined by Arthur Andersen & Co., independent public accountants, for the periods indicated in their reports with respect thereto. In such reports that firm states that its opinions are based on the reports of other accountants with respect to certain subsidiaries. Such financial statements are included herein in reliance upon the authority of said firms as experts in giving such reports.

#### LEGAL OPINIONS

Legal matters in connection with this offering are being passed upon for the Company by Willkie Farr & Gallagher, New York, in regard to United States law; Zimmerman, Winters, Worley, Grant, Hugo, Paddon & Bennett, Toronto, in regard to Canadian law; and Freshfields, London, in regard to English law. Reference is made to various law firms named under "Taxation" on whose opinions statements in regard to taxes and dividend distributions are based. Allan F. Conwill, a partner of Willkie Farr & Gallagher, is a director of Investors Overseas Services Management Limited and of The Fund of Funds, Limited.

(1) The Company has entered into separate agreements with two employees granting them the right to acquire 50,000 and 40,000 Preferred Shares, respectively, at the March 31, 1969 Formula Value Price as adjusted for the 4-for-1 stock split in September 1969. The first third of the Preferred Shares which may be acquired upon exercise of the 50,000 share option can be converted into Common Shares at any time after December 1, 1969; all Preferred Shares which may be acquired upon exercise of the 40,000 share option may be converted into Common Shares at any time after January 1, 1969. These are the only options granted by the Company which are exceptions to the material above. (For another special arrangement concerning issuance of Preferred Shares, see Note 2 to Notes to Consolidated Financial Statements of I.O.S., Ltd. and subsidiaries.)

**APPROVAL OF DIRECTORS AND OFFICERS**

The Executive Management Committee acting pursuant to the By-laws of I.O.S., Ltd., and the following officers of I.O.S., Ltd., have approved this prospectus as accurate and complete and have authorized its use in connection with this offering.

Bernard Cornfeld,  
President and Principal Executive Officer.

Edward M. Cowett,  
Executive Vice President and Principal Operating Officer.

Melvin N. Lechner,  
Treasurer and Principal Financial Officer.

**CONSENT OF INDEPENDENT PUBLIC ACCOUNTANTS**

As independent public accountants, we hereby consent to the use of our reports and to all references to our firm included in or made part of this prospectus.

ARTHUR ANDERSEN & Co.

Zurich, Switzerland,  
September 24, 1969



**Excerpts from Crang Prospectus**

No securities commission or similar authority in Canada has in any way passed upon the merits of the securities offered hereunder and any representation to the contrary is an offence. This prospectus constitutes a public offering of these securities for sale only in those provinces of Canada where a prospectus has been filed.

The 1,450,000 common shares offered hereby are being sold on behalf of shareholders of the Company and no part of the proceeds of sale of such common shares will be received by the Company. Reference is made to "Principal Holders of Securities" on page 34 hereof for information relating to such selling shareholders.

**\$15,660,000**



**I.O.S., LTD.**

(Incorporated under the laws of Canada)

**1,450,000 Common Shares**

(of the par value of 25¢ (United States currency) each)

### VOTING RIGHTS

If the Company has in either of the two preceding calendar years paid a cash dividend of at least 1¢ (U.S.) per share or a stock dividend equivalent in value to at least 1¢ (U.S.) per share on each outstanding share of the Company,

- (i) the holders of the preferred shares of the Company, voting separately and as a class, are entitled to elect  $\frac{3}{4}$  of the directors of the Company, and
- (ii) the holders of the common shares of the Company, voting separately and as a class, are entitled to elect the remaining directors of the Company.

	Price to Public	Underwriting Discount*	Proceeds to Selling Shareholders
<b>Per Share</b>	<b>\$10.80</b>	<b>\$ .549</b>	<b>\$10.251</b>
<b>Total</b>	<b>\$15,660,000</b>	<b>\$796,000</b>	<b>\$14,864,000</b>

\*Before deducting expenses of offering, estimated at \$200,000, payable by the Canadian Underwriter.

A total of 10,992,000 common shares of the Company are being contemporaneously offered, of which 1,450,000 shares are being offered by this prospectus, 3,942,000 shares are being separately offered outside Canada through Investors Overseas Bank Limited, a subsidiary of the Company, and 5,600,000 shares are being separately offered outside Canada through a group of United Kingdom and European underwriters. The price to the public in each of these offerings will be \$10.80 (\$10 U.S.) per share. Reference is made to "Other Offerings" on page 29 hereof. The only expenses or other amounts payable by the Company in connection with these offerings are underwriting commissions and management fees in the amount of approximately \$3,482,000 in connection with the offering of the said 5,600,000 shares.

We, as principals, offer these shares, subject to prior sale, if, as and when accepted by us. Subscriptions will be received subject to rejection or allotment in whole or in part and the right is reserved to close the subscription books at any time without notice. It is expected that certificates for these shares will be available for delivery in definitive form on or about October 15, 1969. At any time after the expiration of the period of 45 days immediately following delivery of these shares to the Underwriter, holders of these shares will be entitled, at their option, to exchange share certificates representing their shares for bearer share warrants representing their shares. Title to shares represented by such warrants will pass by delivery of such warrants.

*J. H. Crang & Co.*  
Toronto, Canada

All dollar figures herein, unless otherwise indicated, are in Canadian Dollars.



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## FINANCIAL STATEMENTS AND STATISTICAL INFORMATION

The financial statements and statistical information contained herein have been taken from the records of the companies concerned. Except in the case of I.O.S. Regent Fund Ltd. and Regent Fund Advisers (1963) Ltd., the information contained in all such records, unless otherwise indicated, is stated in terms of U.S. dollars and, for the purposes of this prospectus, unless otherwise indicated, U.S. dollar amounts have been converted into Canadian dollars on the basis of \$1.00 U.S. being the equivalent of \$1.08125 Canadian.

*All dollar figures herein, unless otherwise indicated, are in Canadian Dollars.*



common shares and preferred shares of the Company owned prior to the completion of this offering by all the Selling Shareholders who, prior to completion of this offering, owned more than 123,000 common shares are as follows:

Name of selling shareholder	Number of common shares owned prior to this offering	Number of preferred shares to be owned after completion of this offering	Percentage of outstanding preferred shares to be owned after completion of this offering
Bernard Cornfeld.....	820,448	7,384,064	16.92%
Lester Hayes.....	382,248	382,248	.87%
John Templeton.....	221,504	896,000	2.05%
Eli Wallitt.....	161,272	280,000	.64%
John Curran.....	160,000	480,000	1.12%
George Landau.....	128,136	1,153,240	2.64%
Donald Q. Shaprow.....	128,000	1,153,376	2.64%
Gladis Solomon.....	128,000	1,152,000	2.63%
Richard M. Hammerman.....	128,000	1,076,032	2.46%
Jack Himes.....	123,200	1,108,800	2.56%
Total.....	2,380,808	15,065,760	34.53%

In addition 480 Selling Shareholders owned in the aggregate 3,011,192 common shares prior to completion of this offering.

#### PRIOR SALES OF SHARES

Within the past 5 years, the only shares of the Company which were issued were issued at the following times and for the following consideration:

- (i) as indicated under the heading "History of the Company's Business" on page 4 hereof, 6,118,695 shares of the Company were issued to the Predecessor Company on June 20, 1969 in partial consideration of the transfer to the Company of all the assets (except for \$216,250 cash) of the Predecessor Company;
- (ii) on June 16, 1969, one share of the Company was issued at a price of \$1.40; and
- (iii) between June 30, 1969 and August 31, 1969, 213,709 shares of the Company were sold under The IOS Stock Option Plan at prices ranging from \$8.69 to \$14.49 per share.

#### TRANSFER AGENTS AND REGISTRARS

Montreal Trust Company at its principal office in Toronto, Canada is the transfer agent and registrar for the common shares and the preferred shares of the Company. The Royal Bank of Canada Trust Corporation Limited at its principal office in London, England is the branch transfer agent and registrar for such shares.

#### AUDITORS

The auditors of the Company are Arthur Andersen & Co., Beaugasse 9, 8001, Zurich, Switzerland.

#### MATERIAL CONTRACTS

Except for contracts entered into in the ordinary course of business, neither the Predecessor Company nor the Company nor any of their subsidiaries have entered into any material contracts within two years prior to the date hereof other than

*All dollar figures herein, unless otherwise indicated, are in Canadian Dollars.*



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### Certificate of the Company

The foregoing constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus as required by Part 7 of The Securities Act, 1967 (Alberta) and the regulations thereunder, by Part VII of the Securities Act, 1967 (British Columbia) and the regulations thereunder, by Part VII of The Securities Act, 1968 (Manitoba) and the regulations thereunder, by Section 13 of the Securities Act (New Brunswick), by Part VII of The Securities Act, 1966 (Ontario) and the regulations thereunder, under The Securities Act (Quebec) and by Part VIII of The Securities Act, 1967 (Saskatchewan) and the regulations thereunder.

DATED: September 22, 1969.

(Signed) BERNARD CORNFELD  
President and Chief Executive Officer

(Signed) JAMES ROOSEVELT  
Director, on behalf of the Board

(Signed) MELVIN LECHNER  
Treasurer and Chief Financial Officer

(Signed) EDWARD M. COWETT  
Director, on behalf of the Board

### Directors

(Signed) BERNARD CORNFELD  
(Signed) JAMES ROOSEVELT  
(Signed) EDWARD M. COWETT  
(Signed) GEORGE LANDAU  
(Signed) ALLEN R. CANTOR  
(Signed) BEN HEIRS\*  
(Signed) ERIC WYNDHAM WHITE  
(Signed) R. M. HAMMERMAN  
(Signed) RICHARD GANGEL  
(Signed) ELI WALLITT  
(Signed) GEORGE VON PETERFFY  
(Signed) M. M. BROOKE

(Signed) C. HENRY BUHL, III  
(Signed) CARL JOHAN BERNADOTTE\*  
(Signed) PASQUALE CHIOMENTI\*  
(Signed) HARVEY FELDERBAUM\*  
(Signed) ROY KIRKDOFFER\*  
(Signed) ERICH MENDE\*  
(Signed) MARTIN SELIGSON\*  
(Signed) BARRY HARMAN STERLING\*  
(Signed) ROBERT SUTNER\*  
(Signed) GEORGE TREGGA\*  
(Signed) IRA WEINSTEIN\*  
(Signed) WILSON WATKINS WYATT\*

\*by his agent, (Signed) EDWARD M. COWETT

### Certificate of Canadian Underwriters

To the best of our knowledge, information and belief, the foregoing constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus as required by Part 7 of The Securities Act, 1967 (Alberta) and the regulations thereunder, by Part VII of the Securities Act, 1967 (British Columbia) and the regulations thereunder, by Part VII of The Securities Act, 1968 (Manitoba) and the regulations thereunder, by Section 13 of the Securities Act (New Brunswick), by Part VII of The Securities Act, 1966 (Ontario) and the regulations thereunder, under The Securities Act (Quebec) and by Part VIII of The Securities Act, 1967 (Saskatchewan) and the regulations thereunder.

DATED: September 22, 1969.

J. H. CRANG & CO.

By: (Signed) M. J. HOWE

The following includes the names of the partners of J. H. Crang & Co.: James Harold Crang, Eric Duff Scott, Dennis A. FitzGerald, Murray Joseph Howe, David M. Dunlap, Paul Robert, Fred Vernon McCann, Owen Anthony Haig Sims, James William Bradshaw, Peter C. D. Best and G. C. Donley (limited partner).